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TRANSCRIPT OF RECORD,

Supreme Court of the United States

OCTOBER TERM, 1944

No. 37

TOM TUNSTALL, PETITIONER,

vs.

**BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, OCEAN LODGE No. 76, PORT NOR-
FOLK LODGE No. 775, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT**

PETITION FOR CERTIORARI FILED MARCH 10, 1944.

CERTIORARI GRANTED MAY 29, 1944.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT

Appendix to Brief for Appellant

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA (NORFOLK DIVISION)

Civil Action No. 210

TOM TUNSTALL, Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Norfolk, Virginia and Ocean Lodge, No. 76, Norfolk,
Virginia and Port Norfolk Lodge, No. 775, Portsmouth,
Virginia and W. M. Munden, 1123 Hawthorn Avenue,
Norfolk, Virginia and Norfolk Southern Railway Com-
pany, a corporation, Norfolk, Virginia, Defendants.

COMPLAINT FOR DAMAGES CAUSED BY REFUSAL OF AGENT
UND. 3 THE RAILWAY LABOR ACT TO REPRESENT, FOR DAM-
AGES FOR FRAUD, FOR INJUNCTION AND FOR A DECLARATORY
JUDGMENT—Filed August 11, 1942

1. This Action arises under the Act of Congress, June
21, 1934, 48 Stat. 1185; U. S. C., Title 45, Chapter 8; U. S.
[fol. 2] C., Title 28, Section 41 (8); U. S. C., Title 28, Sec-
tion 400; and Federal Rules of Civil Procedure, Rule 17
(b); 23 (a), and 57; as hereinafter more fully appears.

COUNT 1

2. Plaintiff, Tom Tunstall, is a Negro citizen of the
United States and of the State of Virginia. He sues in this
Count in his own right for damages inflicted upon him
individually.

3. The defendant, Brotherhood of Locomotive Firemen
and Enginemen (hereinafter called the Brotherhood) is an
international unincorporated association whose mem-
bership is derived principally from white firemen and engine-
men employed on interstate railroads, including the Nor-
folk Southern Railroad and its successor in interest, the

Norfolk Southern Railway; is the Representative, under the Railway Labor Act, 1934, 48 Stat. 1185, U. S. C. Title 45, Chapter 8, of the craft or class of locomotive firemen employed on said Railroad and is sued as such. It is composed of a Grand Lodge and over nine hundred subordinate lodges, including the defendant subordinate lodges, which are too numerous to make it practicable to bring them all before the Court. The subordinate lodges are also unincorporated associations, each composed of numerous individual locomotive fireman, and it is likewise impracticable to bring them all before the Court. The Brotherhood has a national treasury derived from membership dues and otherwise. By constitutional provision, ritual and practice it restricts its membership to white locomotive firemen and enginemen. Plaintiff is excluded therefrom solely because of race.

4. The defendants, Ocean Lodge, No. 76 and Port Norfolk Lodge, No. 775, are subordinate lodges of the defendant Brotherhood having their locations in Norfolk, Virginia, and Portsmouth, Virginia, respectively, within the [fol. 3] jurisdiction of this Court. The business of each subordinate lodge is managed by a President, Recording Secretary, Legislative Representative, Local Organizer and Local Chairman. The members of the defendant subordinate lodges are either employed by the Norfolk Southern Railroad Company, and directly involved in the matters herein complained of, or are members of the defendant Brotherhood resident within the jurisdiction of this court. Upon information and belief plaintiff alleges that the defendant subordinate lodges constitute all of the lodges of the defendant Brotherhood within the territorial limits of the Norfolk Division of the United States District Court for the Eastern District of Virginia, and are truly and fairly representative of the remaining lodges of the Brotherhood and of the Brotherhood itself, and the interest of all the members, subordinate lodges and the Brotherhood will be adequately represented in the premises by the defendants of record. The defendant subordinate lodges are sued as representatives of the membership, all the subordinate lodges and the Brotherhood itself.

5. The defendant, W. M. Munden, is a white locomotive fireman employed by the Norfolk Southern Railroad and

its successor in interest, the Norfolk Southern Railway; is a member of the defendant Brotherhood who, because of the wrongs inflicted by the Brotherhood upon plaintiff and his class, gained certain advantages and considerations which rightfully belong to plaintiff as hereinafter will appear more fully. He is Local Chairman of defendant Ocean Lodge, No. 76, and acts for the Brotherhood in enforcing the schedule of rules and working conditions and in matters of grievance adjustments and job assignments on the Northern Seniority District of said Railroad. He is sued in his own right and as a representative of the members of the Brotherhood, particularly those employed on the Norfolk Southern Railroad and its successor in interest, the Norfolk Southern Railway Company.

[fol. 4] 6. At all times material herein the defendant Brotherhood has been the representative under the Railway Labor Act aforesaid of the entire craft or class of locomotive firemen employed by the Norfolk Southern Railroad Company and its successor in interest the Norfolk Southern Railway Company, and, as such, under a duty under said Act to represent the members of said craft or class impartially and to refrain from using its position to destroy their job assignments and other rights. On or about October 10, 1941, plaintiff was working for the Norfolk Southern Railroad Company as a locomotive fireman on a passenger run on its Northern Seniority District, running between Norfolk, Virginia and Marsden, North Carolina, under an individual contract of hiring, and was a member of the craft or class of locomotive firemen employed by said Railroad Company. Said run constituted one of the more preferred jobs available to locomotive firemen employed by said Railroad Company. On or about said October 10, 1941, in order to secure for its own members the more favorable job assignments available to locomotive firemen employed by the Norfolk Southern Railroad Company, the defendant Brotherhood failed and refused to represent plaintiff impartially as was its duty under the Railway Labor Act, but on the contrary, acting in the premises as representative of the entire craft or class under the Railway Labor Act wrongfully used its position to induce and force the Norfolk Southern Railroad Company to remove him from his job assignment and replace him with one of its own members.

7. As a result whereof plaintiff lost his job assignment as a locomotive fireman on said passenger run and, in order to continue in his employment, was forced to accept and perform a less desirable assignment in yard service, where the hours are longer and the work more arduous and difficult.

Wherefore, plaintiff demands judgment against the defendant Brotherhood in the amount of \$25,000, and costs.

[fol. 5]

Count II

1. Plaintiff adopts all of the allegations of paragraphs 2, 3, 4, and 5, of Count I. He sues herein his individual capacity for wrongs inflicted on his individual rights; and as representative of all of the Negro firemen employed by the Norfolk Southern Railroad Company, and its successor in interest, the Norfolk Southern Railway Company. Said Negro firemen constitute a class too large to be brought individually before the Court, but there are common questions of law and fact involved herein, common grievances arising out of common wrongs, and common relief for the entire class is sought as well as special relief of this plaintiff; and the interests of said class are fairly and adequately represented by plaintiff.

2. The defendant, Norfolk Southern Railway Company, hereinafter called the Railway Company is a corporation, incorporated in the State of Virginia and is engaged in Interstate Commerce, having its principal place of business in Norfolk, Virginia. It maintains and operates the system or lines of railroads formerly operated by the Norfolk Southern Railroad Company, which was also a corporation incorporated in the State of Virginia. By virtue of the Plan of Reorganization and Reorganization Agreement approved May 14, 1941, the Norfolk Southern Railway Company, assumed all contracts, leases, operating agreements, licenses or permits entered into by the Norfolk Southern Railroad Company, or modified or entered into by the Receivers thereof, not disaffirmed within such time as should be fixed by the Court. On or about January 21, 1942, the Norfolk Southern Railway Company, pursuant to said Plan of Reorganization and Reorganization Agreement, began maintaining and operating the system or lines of railroads formerly operated by the Norfolk Southern

Railroad Company and the agreements and contracts hereinafter mentioned have never been disaffirmed by said Railroad [fol. 6] way Company but have been adopted by said Company and are still in full force and effect, and wherever the terms "Railway" or "Railway Company," or "railroad" are used herein with reference to matters occurring prior to January 21, 1942, said terms refer to the Norfolk Southern Railroad Company and/or its Receivers; if said matters occurred subsequent to January 21, 1942, said terms refer to the Norfolk Southern Railway Company, assignee and successor in interest to the Norfolk Southern Railroad Company.

3. The Negro firemen constitute the minority of the total number of firemen employed by the defendant Railway Company. The white locomotive firemen, all of whom are members of the defendant Brotherhood, constitute the majority of the total number of locomotive firemen employed by the defendant Railway Company. The Negro firemen and the Brotherhood members comprise the entire craft or class of firemen employed by the defendant Railway. By constitutional provision, ritual and practice the Brotherhood restricts its membership to white locomotive firemen, the Negro locomotive firemen, including plaintiff and the class he represents being excluded therefrom solely because of race.

4. By virtue of the fact that they constitute the majority of the total number of locomotive firemen employed by the defendant Railway, the Brotherhood members ever since the passage of the Federal Railway Labor Act, June 21, 1934 (48 Stat. 1185, c. 691, 45 U. S. C. c. 8), have chosen the defendant Brotherhood as the representative of the craft or class of firemen employed on defendant Railway, and the Brotherhood has accepted said position and has ever since claimed the exclusive right to act and has purported to act as the exclusive bargaining agents and grievance representative of the entire craft or class aforesaid and its members have individually and collectively claimed the benefits of the actions of the Brotherhood as said representative. Neither plaintiff nor any of the Negro locomotive firemen employed by the defendant Railway Company has chosen the Brotherhood as his representative but by virtue of the fact that the Brotherhood's members constitute the majority of the craft or class of locomotive

firemen, employed by the Railway, plaintiff and the other Negro locomotive firemen, are compelled under the Railway Labor Act, to accept the Brotherhood as their representative for the purposes of the act.

5. As members of the craft or class of locomotive firemen employed by the defendant Railway Company, and being forced by the Railway Labor Act, to accept the representative chosen by the majority as their representative, plaintiff and the other Negro locomotive firemen have the right to be represented fairly and impartially and in good faith by the representative chosen by said majority. By accepting the position of representative under the Railway Labor Act, of the entire craft or class of locomotive firemen, and by asserting the exclusive right to act as such representative, defendant Brotherhood became the statutory agent of plaintiff and the other Negro minority members of said craft or class and under the obligation and duty to represent them fairly and impartially and in good faith; to give them reasonable notice, opportunity to be heard and a chance to vote on any action adverse to their interests proposed by it; to make prompt and full disclosure of all actions taken by it affecting their interests in any way, and to refrain from using its position as their statutory representative to discriminate against them in favor of itself and its members and from destroying their rights.

Nevertheless, in violation of its obligations and duties the defendant Brotherhood has been persistently hostile and disloyal to plaintiff and the other minority nonmember Negro locomotive firemen, and has constantly sought to destroy their rights and to drive them out of employment in order to create a monopoly of the employment [fol. 8] and the most favored jobs and conditions for its own members. It has always refused and still refuses to notify plaintiff and the other Negro firemen, members of the craft or class, of proposed actions adversely affecting their interests or to give them a chance to be heard or to vote on same. It has constantly refused and still refuses to report to him or them its actions as their statutory representative or to handle their grievances wherever there is an apparent conflict or interest between them and its members; and has always refused and still refuses to

give him and them fair, impartial, honest and faithful representation under the Railway Labor Act.

6. On or about March 28, 1940, the Brotherhood, purporting to act in the premises as the representative under the Railway Labor Act, of the entire craft or class of locomotive firemen employed on the Norfolk Southern Railroad and other railroads in the Southeastern section of the country, but acting in breach of its duties and in fraud of the rights of plaintiff and the other Negro locomotive firemen, members of the craft or class, caused notice to be served on said railroads, including the defendant railroad, of its desire and purpose to amend existing collective bargaining agreements covering the standard provisions of the individual hiring contracts of the individual firemen on each railroad, including the defendant railroad, in such manner as would drive the Negro firemen, including plaintiff, completely out of the service of said railroads. A copy of said Notice is attached hereto as Exhibit I and incorporated in full herewith.

7. On or about February 18, 1941, pursuant to said Notice, the Brotherhood, purporting to act as the exclusive representative under the Railway Labor Act of the entire craft or class of locomotive firemen employed on defendant railroad and other railroads in the Southeastern section of the country, did wrongfully prevail upon defendant [fol. 9] Railway Company to enter into agreement, and did wrongfully negotiate an agreement with the defendant Railway Company whereby the proportion of non promotable firemen, and helpers on other than steam power, should not exceed fifty per cent in each class of service established as such by the carrier, and providing that until such percentage was reached on any seniority district all new runs, and all vacancies created by death, dismissal, resignation or disqualification should be filled by promotable men; and further providing that non-promotable men were those who were not in line for promotion under the present rules and practices to the position of locomotive engineer. A copy of said agreement of February 18, 1941, is attached here as Exhibit II and incorporated herewith. Plaintiff alleges that under the rules and practices in effect that the time that this contract was entered into and at the present time, all Negro locomotive firemen, including plain-

tiff, as a class, are arbitrarily considered ineligible for the position of locomotive engineer and are arbitrarily classified as non promotable.

8. On or about May, 23, 1941, the Brotherhood, again purporting to act in the premises as the exclusive representative under the Railway Labor Act of the entire craft or class, but acting in fraud of the rights of plaintiff and the other Negro minority firemen, and in breach of its duty to them, caused said agreement to be supplemented to provide specifically that the term "nonpromotable firemen" used therein referred only to colored firemen. A copy of said agreement as supplemented is attached hereto as Exhibit III and incorporated herewith.

9. In serving said Notice of March 28, 1940, and in entering into the Agreement of February 18, 1941, and supplement of May 23, 1941, the defendant Brotherhood, although purporting to act as the exclusive representative of the entire craft or class of locomotive firemen employed [fol. 10] on defendant railroad, gave plaintiff and the other Negro minority firemen no notice thereof or opportunity to be heard or vote thereon; nor was the existence of said agreement and supplement disclosed to them until the Brotherhood forced plaintiff off his run by virtue thereof, as hereinafter will appear more fully; but the Brotherhood, well knowing plaintiff's and the other Negro firemen's interest therein, and maliciously intending and contriving to secure a monopoly of employment and the most favorable jobs for its own members, acted in fraud of the rights of plaintiff and the other Negro firemen and failed and refused to represent them fairly and impartially as was its duty as their representative under the Railway Labor Act.

10. On the date that said agreement and supplement went into effect the defendant railway company operated passenger train service on its Northern Seniority District, running between Norfolk, Virginia and Marsden, North Carolina. Two firemen were used in said service one of whom was a white member of defendant Brotherhood and the other was a Negro firemen, nonmember of said Brotherhood. Assignment to said service constituted one of the more preferred assignments available to locomotive firemen employed on defendant railroad. The hours were

shorter and the work less arduous than that required of locomotive firemen who were assigned to other classes of service, particularly yard service. On or about June 1941, the white fireman who had been assigned to said run left it for another assignment, thereby creating a vacancy. In accordance with his individual contract of hiring plaintiff was assigned to said run. He worked said assignment with competence and skill and to the satisfaction of the Railway Company, until on or about October 10, 1941, when the defendant Brotherhood, again fraudently and in breach of its duty as the representative under the Railway Labor Act of the entire craft or class of locomotive firemen, employed by the defendant Railway, did wrongfully press [fol. 11] said agreement and supplement and asserted that the plaintiff's assignment to said run was in breach thereof, and wrongfully induced and forced the defendant Railway Company to remove plaintiff from said assignment and to assign defendant, W. M. Munden, a member of the Brotherhood to same.

11. As a result whereof, plaintiff has lost his assignment on said passenger run and valuable property rights that have accrued to him while in the service of the defendant Railway Company, and in order to continue in his employment, has been forced to accept and perform an assignment in yard service where he has to work longer hours and perform more difficult and arduous labor, and unless this Honorable Court grants relief he will be forced to continue to accept and perform more difficult and arduous labor and will suffer irreparable damage.

12. Plaintiff has requested the defendant Railway Company to restore him to his assignment on the passenger train but said defendant Railway Company asserted that under the provisions of the Railway Labor Act and said agreement entered into pursuant thereto, it is powerless to do so unless plaintiff's representative under the Railway Labor Act, the defendant Brotherhood, demands it. He has requested the Brotherhood as his representative to represent him before the management of the Railway Company for the purpose of having his assignment and property rights restored but said Brotherhood, in violation of its duty has failed and refused to represent him or even to acknowledge his request.

13. The matters and things hereinbefore complained of constitute an actual controversy between plaintiff and the class he represents on the one side and the defendants on the other. The interests of plaintiff and the class he represents are adverse to the interests of the defendants and [fol. 42] those they represent. The right of plaintiff and the class he represents to be represented fairly and impartially and in good faith by the representative under the Railway Labor Act of the entire class or craft of locomotive firemen employed on defendant railroad has been violated and denied and, as a result, damaged incurred, and unless this Honorable Court will declare the rights, interests, and other legal relations of the respective parties, as provided for in Section 400, Title 28, United States Code, and Rule 57 of the Federal Rules of Civil Procedure, numerous vexatious disputes will arise between the parties hereto and those they represent, and plaintiff will suffer irreparable and incalculable injury.

Wherefore, plaintiff prays:

1. A declaratory judgment, binding on all the parties hereto and their privies, settling and declaring the rights, interests and legal relationships of the respective parties in and to and by reason of the matters hereinbefore detailed.

2. A declaratory judgment, that the defendant Brotherhood in accepting the position and acting as the exclusive representative under the Railway Labor Act of the craft or class of locomotive firemen employed by the Norfolk Southern Railway Company, and its predecessors in interest, assumed and is under the obligation to represent fairly and without discrimination all of the members of the said craft or class, including plaintiff and other minority locomotive firemen, nonmembers of said Brotherhood.

3. A permanent injunction against each and all of the defendants restraining and enjoining them and each of them from enforcing or otherwise recognizing the binding effect of the Agreement of February 18, 1941, and the supplement of May 23, 1941, in so far as said agreement and supplement deprives plaintiff of his assignment on the passenger train [fol. 13] run between Norfolk, Virginia, and Marsden, North Carolina, or in any other way interferes with his occupation as a locomotive firemen employed by the defendant Railway Company.

4. A permanent injunction against the Brotherhood, its officers, agents, or subordinate lodges, their officers and agents, perpetually restraining and enjoining them from acting or purporting to act as plaintiff's representative or the representative of the other Negro firemen under the Railway Labor Act, so long as it or they; or any of them, refuse to represent him and them fairly and impartially; and so long as it or they continue to use its position to destroy the rights of plaintiff and the class he represents herein.
5. Damages against the Brotherhood for its refusal to represent him and the destruction of his rights as a locomotive fireman in the amount of (\$25,000.00) Twenty-Five Thousand Dollars.
6. Restoration of his right to hold his assignment on the passenger run between Norfolk, Virginia, and Marsden, North Carolina.
7. For such other and further relief as to the Court may seem just and proper.

Joseph C. Waddy, 615 F Street, N. W., Washington,
D. C.; Charles H. Houston, 615 F Street, N. W.
Washington, D. C.; Oliver W. Hill, 117 E. Leigh
Street, Richmond, Virginia, Attorneys for Plaintiff

[fol. 14]

EXHIBIT I TO COMPLAINT

Brotherhood of Locomotive Firemen and Enginemen

—General Grievance Committee

— Railway

March 28, 1940.

Mr. _____, _____,

DEAR SIR:

This is to advise that the employees of the — Railway engaged in service, represented and legislated for by the Brotherhood of Locomotive Firemen and Enginemen, have approved the presentation of request for the establishment

of rules governing the employment and assignment of locomotive firemen and helpers, as follows:

1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.
2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.
3. When permanent vacancies occur or established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.
4. It is understood that promotable firemen or helpers on other than steam power are those in line for promotion under the present rules and practices to the position of locomotive engineer.

In accordance with the terms of our present agreement, and in conformity with the provisions of the Railway Labor Act, kindly accept this as the required official notice of our desire to revise the agreement to the extent indicated.

[fol. 15] The same request is this date being presented on the following railroads:

Atlantic Coast Line
Jacksonville Terminal
Atlanta Joint Terminal
Atlanta & West Point
Western Railroad of Ala.
Central of Georgia
Frankfort & Cincinnati
Georgia Railroad
Georgia & Florida
Gulf, Mobile & Northern
Louisville & Nashville

Memphis Union Station Co.
Louisiana and Arkansas
Mobile and Ohio, Columbus
& Greenville
Norfolk and Portsmouth Belt
Norfolk & Southern
Norfolk & Western
Seaboard Airline
Southern Railroad System
St. Louis-San Francisco
Tennessee Central

It is our request that all lines or divisions of railway controlled by the —— Railway shall be included in settlement of this proposal and that any agreement reached shall apply to all alike on such lines or divisions.

It is desired that reply to our proposal be made in writing to the undersigned on or before April 7, concurring therein, or fixing a date within 30 days from date of this letter when conference with you may be had for the purpose of discuss-

ing the proposal. In event settlement is not reached in conference, it is suggested that this railroad join with others in authorizing a conference committee to represent them in dealing with this subject. In submitting this proposal we desire that it be understood that all rules and conditions in our agreements not specifically affected by our proposition shall remain unchanged subject to change in the future by negotiations between the proper representatives as has been the same in the past.

Yours truly, (*Signed*) General Chairman.

[fol. 16]

EXHIBIT II TO COMPLAINT

Agreement

Between the Southeastern Carriers' Conference Committee
representing the

Atlantic Coast Line Railway Company

Atlanta & West Point Railroad Company and Western
Railway of Alabama

Atlanta Joint Terminals

Central of Georgia Railroad Company

Georgia Railroad

Jacksonville Terminal Company

Louisville & Nashville Railroad Company

Norfolk & Portsmouth Belt Line Railroad Company

Norfolk Southern Railroad Company

St. Louis-San Francisco Railway Company

Seaboard Air Line Railway Company

Southern Railway Company (including State University
Railroad Company and Northern Alabama Railway
Company)

The Cincinnati, New Orleans and Texas Pacific Railway
Company

The Alabama Great Southern Railroad Company (including
Woodstock and Blackton Railway Company and Belt Rail-
way Company of Chattanooga)

New Orleans and Northeastern Railroad Company

New Orleans Terminal Company

Georgia Southern and Florida Railway Company

St. Johns River Terminal Company

Harriman and Northeastern Railroad Company.
 Cincinnati, Burnside and Cumberland River Railway
 Company
 Tennessee Central Railway Company

and the

Brotherhood of Locomotive Firemen and Enginemen

(1) On each railroad party hereto the proportion of non-[fol. 17] promotable firemen, and helpers on other than steam power, shall not exceed fifty percent in each class of service established as such on each individual carrier. This agreement does not sanction the employment of non-promotable men on any seniority district on which non-promotable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2) (a) and (2) (b) men now holding seniority as firemen, or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. & E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provisions.

(6) All persons hereafter hired as firemen shall be required, in addition showing, in the opinion of the manage-

ment, reasonable proficiency, to take within stated periods to be fixed by the three years, two examinations to be prepared by management and to be applied to all alike to test their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

[fol. 18] Firemen hereafter hired declining to take or failing to pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall, when there is need for additional engineers, be promoted to such position, and will establish a seniority date as engineer in accordance with the rules contained in the agreements on the individual railroads.

When rules for conduct of examinations for promotion are included in current schedules, such rules shall apply. In the absence of such rules firemen failing to pass will be given a second trial within a period of three months and if they fail to pass on the second trial will be given a third trial within a period of three months.

Promotable firemen declining to take examinations for promotion, or who fail in their efforts to successfully pass the same, shall be dropped from the service.

All promotable firemen now in the service physically qualified, who have not heretofore been called for examination for promotion, or who have not waived promotion, shall be called in their turn for promotion. When so called should they decline to take such examination for promotion or fail to pass as herein provided, they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers on other than steam power to

promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers.

[fol. 19] (8) This agreement shall become effective February 22, 1941.

Signed at Washington, D.C., this 18th day of February, 1941.

For the Carriers:

Southeastern Carriers' Conference Committee, C. D. Mackay, Chairman, C. D. Mackay, H. A. Benton, C. G. Sibley, Committee Members.

For the Employees:

Brotherhood of Locomotive Firemen and Enginemen, D. B. Robertson, President; Brotherhood of Locomotive Firemen and Enginemen's Committee, W. C. Metcalfe, Chairman.

[fol. 20]

EXHIBIT III TO COMPLAINT

Supplementary Agreement Effective February 22, 1941, to the Agreement between the Norfolk Southern Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen Dated September 1, 1928

The purpose of this supplementary agreement is to incorporate as a part of the agreement dated September 1, 1928, between the Norfolk Southern Railroad Company and The Brotherhood of Locomotive Firemen and Enginemen, the agreement reached in mediation and covered by the National Mediation Board Docket Case No. A-905, which agreement reads as follows:

(1) On each railroad party hereto the proportion of non-promutable firemen, and helpers on other than steam power, shall not exceed fifty per cent in each class of service established as such on each individual carrier. This agreement does not sanction on which non-promutable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2) (a) and (2) (b), men now holding seniority as firemen, or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

[fol. 21] (5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. & E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provision.

(6) All persons hereafter hired as firemen shall be required, in addition to showing, in the opinion of the management, reasonable proficiency, to take within stated periods to be fixed by management, but in no event to extend over a period of more than three years, two examinations to be prepared by management and to be applied to all alike to test their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

Firemen hereafter hired declining to take or failing to pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall, when there is need for additional engineers, be promoted to such position, and will establish a

seniority date as engineer in accordance with the rules contained in the agreements on the individual railroads.

When rules for conduct of examinations for promotion are included in current schedules, such rules shall apply. In the absence of such rules firemen failing to pass will be given a second trial within a period of three months and if they fail to pass on the second trial will be given a third trial within a period of three months.

Promotable firemen declining to take examinations for promotion or who fail in their efforts to successfully pass the same, shall be dropped from the service.

All promotable firemen now in the service physically qualified, who have not heretofore been called for examination or promotion, or who have not waived promotion, shall [fol. 22] be called in their turn for promotion. When so called should they decline to take such examination or promotion or fail to pass as herein provided, they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employes do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers by other than steam power to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers.

(8) This agreement shall become effective February 22, 1941.

The committee representing the firemen requested that paragraphs 1 to 4 of the Mediation Board agreement quoted above be included as a part of this supplementary agreement as provided for in paragraph 5 of said agreement.

The definition and application of the phrases "—each class of service established as such—" contained in the first sentence of paragraph 1 as that the following constitute the classes of service to which paragraph 1 applied:

Passenger

Local Freight

Through Freight

Work, Ballast and Construction

Yard

The provision of paragraph 2 (b) is understood and agreed to mean that not in excess of 50 percent non-promutable men will be assigned to any class of service on any seniority district.

Example 1

In case of only one assignment in any class of service, on any seniority district, and such assignment is filled by a [fol. 23] non-promutable fireman, in the event of the death, dismissal, resignation or disqualification of such non-promutable firemen the assignment would then be filled by a promotable fireman.

Example 2

In case of 4 assignments in any class of service on any seniority district filled by one promotable and 3 non-promutable firemen, in the event of the death, dismissal, resignation or disqualification on one of the non-promutable firemen, the assignment would then be filled by a promotable fireman.

It is understood and agreed that the phrase "—non-promutable fireman—" carried in paragraph 1 of the above quoted agreement refers only to colored firemen.

It is agreed that promotable firemen now in the service who are physically qualified and not otherwise restricted, who have heretofore been called for examination for promotion and failed, or who have waived promotion, will be called for examination for promotion between May 1 and May 15, 1942. In the event such firemen fail to pass examination for promotion, or waive examination, their seniority as firemen shall not be affected.

Norfolk Southern Railroad Company. M. S. Hawkins and, L. H. Windholz, Receivers, (signed) by J. C. Poe, Assistant to General Superintendent.

Accepted for the Firemen: (signed) G. M. Dodson, General Chairman, Brotherhood of Locomotive Firemen and Enginemen.

Raleigh, N. C., May 23, 1941.

[fol. 24] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

AFFIDAVIT OF TOM TUNSTALL.

STATE OF VIRGINIA,
City of Norfolk, ss:

Tom Tunstall, plaintiff, being first duly sworn, on oath, states in opposition to the motion of Carl J. Goff:

I. He denies that W. M. Munden, a defendant herein, is not an agent or officer of the defendant Brotherhood of Locomotive Firemen and Enginemen or that his duties are restricted to represent only the Norfolk Southern members of Ocean Lodge No. 76 in the handling of grievances with local officials of the Norfolk Southern Railroad, and states that the defendant Brotherhood as the statutory representative under the Railway Labor Act of the craft or class of locomotive firemen, including plaintiff and the minority non Brotherhood negro firemen on said railroad, has delegated its powers for representing the entire craft or class of firemen on the northern seniority district of the Norfolk Southern Railroad, on which plaintiff works, to the defendant W. M. Munden, local chairman of Ocean Lodge No. 76 for the handling of grievances of the individual members of the craft or class of firemen on said northern seniority district with the local officials of said railroad; that in the premises he acts as agent or officer of the Brotherhood; that as such agent or officer of the Brotherhood he did induce and force the Norfolk Southern Railroad to remove plaintiff from his job assignment as alleged in the complaint.

Tom Tunstall.

Subscribed and sworn to before me this 4th day of March, 1943, Notary Public. My commission expires _____.



[fol. 25] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA

[Title omitted]

MOTION TO DISMISS UNDER RULE 12 (b)

Now comes defendant, Brotherhood of Locomotive Firemen and Enginemen, a voluntary unincorporated association, by and through D. B. Robertson and Carl J. Goff, its President and Assistant President, respectively, appearing specially for the following purposes and no other, and without intending there-by to make any general appearance in this cause and moves the Court as follows:

I

To dismiss the action so far as concerns this defendant, on the grounds:

- (a) That there has been no service of process on this defendant as appears by the return of the Marshall of the Eastern District of Virginia on the original complaint in this cause;
- (b) That this defendant is a voluntary unincorporated association with its headquarters in the City of Cleveland, in the State of Ohio, and that no officer of said defendant nor any trustee of said defendant has been served with process within the Eastern District of Virginia or elsewhere; all of which more fully appears by the affidavit of [fol. 26] said Carl J. Goff attached to and made a part of this motion;
- (c) That there has been no proper service of process on this defendant;

II

To dismiss the action on the ground that this Court lacks jurisdiction because

- (a) The amount actually in controversy is less than \$3,000 exclusive of interest and costs;
- (b) That the action does not arise under the Constitution or laws of the United States;
- (c) That no sufficient basis of Federal jurisdiction is alleged or appears from the complaint; and
- (d) That there is no diversity of citizenship alleged or shown in the complaint.

III

To dismiss the action because the Court lacks jurisdiction over the person of this defendant by reason of the fact that there has been no service on this defendant and this defendant is not before the Court.

Harold C. Heiss, 906 Keith Building, Cleveland, Ohio; Wm. G. Maupin, 415 Bank of Commerce Bldg., Norfolk, Virginia, Attorneys for defendant, Brotherhood of Locomotive Firemen & Engine-men, appearing specially as foresaid.

[fol. 27] IN DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA

[Title omitted]

AFFIDAVIT OF CARL J. GOFF

STATE OF OHIO,

Cuyahoga County, ss:

Carl J. Goff, being first duly sworn, deposes and says that he resides in the City of Shaker Heights, County of Cuyahoga, State of Ohio; that he is Assistant President of the Brotherhood of Locomotive Firemen and Engine-men, and that this affidavit is being made for use in connection with the motion to dismiss filed by said Brotherhood in the case of Tom Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, et al., Pending in the District Court of the United States for the Eastern District of Virginia, Norfolk Division, Civil Action File No. 210.

Affiant says that the Brotherhood of Locomotive Firemen and Enginemen, hereinafter called Brotherhood, is a voluntary unincorporated association having its headquarters in the City of Cleveland, Ohio; that it has more than 165,000 members scattered throughout the United States and Canada; that it is a labor organization, international in scope; that its membership is limited to individuals who are engaged either in the United States or Canada in the trade or calling of locomotive engineer or fireman, and [fol. 28] that said association is not organized or operated for pecuniary profit.

Affiant further says that representatives of the membership of said Brotherhood assembled in Convention, there being one representative from each of the more than nine

hundred local lodges of the Brotherhood, elect a corps of officers consisting of the following, to-wit: President, Assistant President, Vice-President-National Legislative Representative for the United States, ten Vice-Presidents, General Secretary and Treasurer and Editor and Manager of the Magazine. That said officers are alone empowered to and do conduct the affairs of the Brotherhood between Conventions, and are its only representatives.

Affiant further says that said local lodges are located at division points on railways throughout the United States and Canada. Each of said local lodges is within itself a separate and distinct voluntary unincorporated association officered and directed by men solely from its own membership and of its own selection. Each of said lodges is itself primarily responsible for the settlement of all its problems or trade disputes arising in its local field.

Affiant further says that W. M. Mundén, one of the named defendants in this cause, is a local chairman of one of such local lodges, to-wit, Ocean Lodge No. 76, which has about 115 members; that said W. M. Mundén is employed by the Norfolk Southern Railroad and is local chairman (which means chairman of the local grievance committee) of said local lodge for the Norfolk Southern Railroad. That said W. M. Mundén is compensated for his services by said local Lodge No. 76 only, from funds collected from the members of said lodge employed on the Norfolk Southern Railroad. That the duties of said W. M. Mundén are to represent only the Norfolk Southern members of said lodge in the handling of grievances with local officials of the Norfolk Southern Railroad, and with no other railroad officials whatever, and that his duties are limited to said business and affairs [fol. 29] of the Norfolk Southern members of said local Lodge No. 76. That said W. M. Mundén was elected at office solely by the Norfolk Southern members of said local Lodge, is responsible only to them and is not an agent, officer, general agent or employee of the Brotherhood, nor does he act for the Brotherhood when enforcing the schedule of rules and job assignments on the northern seniority district of the Norfolk Southern Railroad.

Affiant further says that the funds for defraying the costs and expenses and for carrying out the purposes of local Lodge No. 76 are derived from dues and assessments levied by said local lodge on its members; that funds for

use of the local grievance committee of said Ocean Lodge No. 76, of which W. M. Munden is chairman, are derived from assessments levied solely by the members of said local lodge employed on said Norfolk Southern Railroad upon themselves for the purpose of carrying on the functions of said local grievance committee. That no one other than a member of said lodge employed on the adjacent seniority district of the Norfolk Southern has any voice in the election of, or the term of office of, or direction of duties of said W. M. Munden.

Carl J. Goff.

Subscribed and sworn to before me, a Notary Public in and for said County and state, this 28th day of August, A. D. 1942. C. J. Theis, Notary Public. My commission expires June 17, 1945. [Notarial Seal.]

[fol. 30] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

[Title omitted]

MOTION TO DISMISS UNDER RULE 12(b)

Now comes defendant Port Norfolk Lodge No. 775, Portsmouth, Virginia, and moves the Court as follows:

To dismiss the action on the grounds that this Court lacks jurisdiction because:

- (a) The amount actually in controversy is less than \$3,000 exclusive of interest and costs;
- (b) That the action does not arise under the Constitutional or laws of the United States;
- (c) That no sufficient basis of Federal jurisdiction is alleged or appears from the complaint; and
- (d) That there is no diversity of citizenship alleged or shown in the complaint.

Harold C. Egiss, 906 Keith Building, Cleveland, Ohio; Wm. G. Maupin, 415 Bank of Commerce Bldg., Norfolk, Virginia, Attorneys for Defendant Port Norfolk, Lodge No. 775, Portsmouth, Virginia.

[fol. 31] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA

[Title omitted]

MOTION TO DISMISS UNDER RULE 12 (b)

Now comes defendant W. M. Munden, Norfolk, Virginia, and moves the Court as follows:

To dismiss the action on the grounds that this Court lacks jurisdiction because:

- (a) The amount actually in controversy is less than \$3,000.00 exclusive of interest and costs;
- (b) That the action does not arise under the Constitution or laws of the United States;
- (c) That no sufficient basis of Federal jurisdiction is alleged or appears from the complaint; and
- (d) That there is no diversity of citizenship alleged or shown in the complaint.

Harold C. Heiss, 906 Keith Building, Cleveland,
Ohio; Wm. G. Maupin, 415 Bank of Commerce
Bldg., Norfolk, Virginia, Attorneys for Defendant W. M. Munden.

[fol. 32] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA

[Title omitted]

MOTION TO DISMISS AND QUASH PURPORTED SERVICE OF
SUMMONS UNDER RULE 12 (b)

Now comes defendant, Ocean Lodge No. 76, Norfolk, Virginia, appearing specially for the following purposes and no other, and without intending thereby to make any general appearance in this cause, and moves the Court as follows:

I

To dismiss the action so far as concerns this defendant and to quash the purported service of summons on this defendant on the grounds that

- (a) This defendant is a voluntary unincorporated association with headquarters in the Eastern District of Vir-

ginea; and that no officer of said defendant, nor any trustee of said defendant has been served with process within the Eastern District of Virginia or elsewhere;

(b) That there has been no proper service on this defendant as appears by the return of the Marshall of the Eastern District of Virginia on the original complaint in this cause.

[fol. 33]

II

To dismiss the action on the grounds that this Court lacks jurisdiction because

(a) The amount actually in controversy is less than \$3,000.00 exclusive of interest and costs;

(b) That the action does not arise under the Constitution or laws of the United States;

(c) That no sufficient basis of Federal jurisdiction is alleged or appears from the complaint; and

(d) That there is no diversity of citizenship alleged or shown in the complaint.

III

To dismiss the action because the Court lacks jurisdiction over the person of the defendant by reason of the fact that there has been no service on this defendant and this defendant is not before the Court.

Harold C. Heiss, 906 Keith Building, Cleveland, Ohio; Wm. G. Maupin, 415 Bank of Commerce Bldg., Norfolk, Virginia, Attorneys for Defendant, Ocean Lodge, No. 76, Norfolk, Virginia.

[fol. 34] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA

[Title omitted]

MOTION TO DISMISS.

Norfolk Southern Railway Company, one of the defendants in the above entitled cause, moves the Court to dismiss the action on the following grounds, to-wit:

1. Because of lack of jurisdiction over the subject matter asserted in the complaint, there being no Federal question involved, nor other reason giving jurisdiction to this Court.
2. Because the Brotherhood of Locomotive Firemen and Enginemen is a necessary party to this action, and has not been brought before this Court, nor process served upon said Brotherhood.
3. Because the complaint does not state a claim upon which relief can be granted, showing no cause of action against this defendant.

(Signed) Jas. G. Martin, Attorney for Norfolk Southern Railway Co., 500 Western Union Bldg., Norfolk, Va.

To the Attorneys for Plaintiff in the above entitled cause.

Take Notice; that the above motion is being filed in said [fol. 35] cause, and will come on for hearing in said Court at a time to be fixed by said Court, of which time notice will be given.

(Signed) Jas. G. Martin, Attorney for Norfolk Southern Railway Co., 500 Western Union Bldg., Norfolk, Va.

Norfolk, Virginia, August 27th, 1942.

This certifies that the above motion was served upon the attorney for the plaintiff in the above entitled cause this day by mailing a copy thereof to Mr. Oliver W. Hill, plaintiff's attorney, 117 East Leigh Street, Richmond, Virginia.

(Signed) Jas. G. Martin, Attorney for Norfolk Southern Railway Co., 500 Western Union Bldg., Norfolk, Va.

[fol. 36] IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA (NORFOLK DIVISION)

Civil Action. No. 210

TOM TUNSTALL, Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Norfolk, Virginia, and Ocean Lodge, No. 76, Norfolk,
Virginia, and Port Norfolk Lodge, No. 775, Portsmouth,
Virginia, and W. M. Munden, 1123 Hawthorne Avenue,
Norfolk, Virginia, and Norfolk Southern Railway Com-
pany, a corporation, Norfolk, Virginia, Defendants.

OPINION—April 15, 1943

In the above entitled civil action plaintiff, Tom Tunstall, alleges and sets forth the following cause against the defendants therein named.

That he is a Negro citizen of the United States and the State of Virginia; that the defendant, Brotherhood of Locomotive Firemen and Enginemen (hereinafter called the [fol. 37] Brotherhood) is an international unincorporated association whose membership is derived principally from white firemen and enginemen employed on interstate railroads, including defendant, Norfolk Southern Railway Company, formerly Norfolk Southern Railroad Company (hereinafter referred to as the Railway), and that said Brotherhood is the representative under the Railway Labor Act, 1934, 48 Stat., 1185, U. S. C., Title 45, Chapter 8, of the craft or class of locomotive firemen employed on the Railway. The Brotherhood is composed of a Grand Lodge and over nine hundred subordinate lodges, and defendants, Ocean Lodge, No. 76, and Port Norfolk Lodge, No. 775, are subordinate lodges of the Brotherhood, having their locations in Norfolk and Portsmouth, respectively, within the jurisdiction of this Court. The business of each subordinate lodge is managed by a president, recording secretary, legislative representative, local organizer and local chairman. The members of the defendant subordinate lodges are either employed by the Railway, and directly involved in the matters herein complained of, or are members of the defendant Brotherhood resident within the jurisdiction of this Court.

Defendant, W. M. Munden, is a white locomotive fireman employed by the Railway and a member of the Brotherhood. Because of the wrongs inflicted by the Brotherhood upon plaintiff and his class, Munden has gained certain advantages and considerations which rightfully belong to plaintiff. Munden is local chairman of defendant Ocean Lodge No. 76, and acts for the Brotherhood in enforcing the schedule of rates and working conditions and in matters of grievance adjustments and job assignments on the Northern Seniority District of the Railway. Munden sued in his own right and as a representative of the members of the Brotherhood, particularly those employed on the Railway.

That at all times material herein the Brotherhood has been the representative under the Railway Labor Act before [fol. 38] said of the entire craft or class of locomotive firemen employed by the Railway, and, as such, under a duty under said Act to represent the members of said craft or class impartially and to refrain from using its position to destroy their job assignments and other rights. On or about October 10, 1941, a plaintiff was working for the Railway as a locomotive fireman on a passenger run on its Northern Seniority District, running between Norfolk, Virginia and Marsden, North Carolina, under an individual contract of hiring, and was a member of the craft or class of locomotive firemen employed by the Railway. Said run constituted one of the more preferred jobs available to locomotive firemen employed by said Railway. On or about said October 10, 1941, in order to secure for its own members the more favorable job assignments available to locomotive firemen employed by the Railway, the Brotherhood failed and refused to represent plaintiff impartially as was its duty under the Railway Labor Act, but on the contrary, acting in the premises as representative of the entire craft or class under that Act wrongfully used its position to induce and force the Railway to remove him from his job assignment and replace him with one of the Brotherhood members:

That as a result plaintiff lost his job assignment as a locomotive fireman on said passenger run and, in order to continue in his employment, was forced to accept and perform a less desirable assignment in yard service, where the hours are longer and the work more arduous and difficult.

Plaintiff sues in his individual capacity for wrongs inflicted on his individual rights, and as representative of all of the Negro firemen employed by the Railway. He alleges that the Negro firemen constitute a class too large to be brought individually before the Court, but there are common questions of law and fact involved herein, common grievances arising out of common wrongs, and common relief for the entire class is sought as well as special relief for the plaintiff; and that the interests of said class are fairly and adequately represented by plaintiff.

[fol. 39] The white locomotive firemen, all of whom are members of the Brotherhood, constitute the majority of the total number of locomotive firemen employed by the Railway, and they and the Negro firemen comprise the entire craft or class of firemen employed by the Railway.

By constitutional provision, ritual and practice the Brotherhood restricts its membership to white locomotive firemen, and Negro locomotive firemen, including plaintiff and the class he represents, are all excluded from the Brotherhood solely because of race.

He alleges that by virtue of the fact that they constitute the majority of the total number of locomotive firemen employed by the defendant Railway, the Brotherhood members ever since the passage of the Federal Railway Labor Act, June 21, 1934 (48 Stat., 1185, c. 691, 45 U. S. C., c. g.), have chosen the defendant Brotherhood as the representative of the craft or class of firemen employed on the Railway. The Brotherhood has accepted said position and has ever since claimed the exclusive right to act, and has purported to act as the exclusive bargaining agent and grievance representative of the entire craft or class aforesaid, and its members have individually and collectively claimed the benefits of the actions of the Brotherhood as said representative. Neither plaintiff nor any of the Negro locomotive firemen employed by the Railway has chosen the Brotherhood as his representative but by virtue of the fact that the Brotherhood's members constitute the majority of the craft or class of locomotive firemen, employed by the Railway, plaintiff and the other Negro locomotive firemen, are compelled under the Railway Labor Act, to accept the Brotherhood as their representative for the purposes of the Act.

As members of the craft or class of locomotive firemen employed by the Railway, and being forced by the Railway

Labor Act to accept the representative chosen by the majority as their representative, plaintiff and other Negro locomotive firemen have the right to be represented fairly [fol. 40] and impartially and in good faith by the representative chosen by said majority. By accepting the position of representative under the Railway Labor Act, of the entire craft or class of locomotive firemen, and by asserting the exclusive right to act as such representative, defendant Brotherhood became the statutory agent of plaintiff and the other Negro minority members of said craft or class and under the obligation and duty to represent them fairly and impartially and in good faith; to give them reasonable notice, opportunity to be heard and a chance to vote on any action adverse to their interests proposed by it; to make prompt and full disclosure to all actions taken by its affecting their interests in any way, and to refrain from using its position as their statutory representative to discriminate against them in favor of itself and its members and from destroying their rights. Nevertheless, in violation of its obligations and duties the Brotherhood has been persistently hostile and disloyal to plaintiff and the other minority nonmember Negro locomotive firemen, and has constantly sought to destroy their rights and to drive them out of employment in order to create a monopoly of the employment and the most favored jobs and conditions for its own members. It has always refused and still refuses to notify plaintiff and the other Negro firemen, members of the craft or class, of proposed actions adversely affecting their interests or to give them a chance to be heard or to vote on same. It has constantly refused and still refuses to report to him or them its actions as their statutory representative or to handle their grievances wherever there is an apparent conflict or interest between them and its members; and has always refused and still refuses to give him and them fair, impartial, honest and faithful representation under the Railway Labor Act.

On or about March 28, 1940, the Brotherhood, purporting to act in the premises as the representative under the Railway Labor Act, of the entire craft or class of locomotive firemen employed on the Railway and other railroads [fol. 41] in the southeastern section of the country, but acting in breach of its duties and in fraud of the rights of plaintiff and the other Negro locomotive firemen, mem-

bers of the craft or class, caused notice to be served on said railroads; including the defendant Railway, of its desire and purpose to amend existing collective bargaining agreement covering the standard provisions of the individual hiring contracts of the individual firemen on each railroad, including the defendant Railway, in such manner as would drive the Negro firemen, including plaintiff, completely out of the service of said railroads.

On or about February 18, 1941, pursuant to said notice, the Brotherhood, purporting to act as the exclusive representative under the Railway Labor Act of the entire craft or class of locomotive firemen employed on defendant Railway and other railroads in the southeastern section of the country, did wrongfully prevail upon the Railway to enter into agreement, and did wrongfully negotiate an agreement with the Railway whereby the proportion of non-promutable firemen, and helpers on other than steam power, should not exceed fifty percent in each class of service established as such by the carrier, and providing that until such percentage was reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification should be filled by promotable men; and further providing that non-promutable men are those who were not in line for promotion under the present rules and practices to the position of locomotive engineer.

Plaintiff also alleges that under the rules and practices in effect at the time that this contract was entered into and at the present time, all Negro locomotive firemen, including plaintiff, as a class, are arbitrarily ineligible for the position of locomotive engineer and are arbitrarily classified as non-promutable.

On or about May 23, 1941, the complaint sets forth, the Brotherhood, again purporting to act in the premises as the exclusive representative under the Railway Labor Act of [fol. 42] the entire craft or class, but acting in fraud of the rights of the plaintiff and the other Negro minority firemen, and in breach of its duty to them, caused said agreement to be supplemented to provide specifically that the term "non-promutable firemen" used therein referred only to colored firemen.

In serving said notice of March 28, 1940, and entering into the agreement of February 18, 1941, and supplement of May 23, 1941, the Brotherhood, although purporting to act as the exclusive representative of the entire craft or class of loco-

motive firemen employed by defendant Railway, gave plaintiff and the other Negro minority firemen no notice thereof or opportunity to be heard or vote thereon; nor was the existence of said agreement and supplement disclosed to them until the Brotherhood forced plaintiff off his run by virtue thereof, as hereinafter will appear more fully; but the Brotherhood, well knowing plaintiff's and the other Negro firemen's interest therein, and maliciously intending and contriving to secure a monopoly of employment and the most favorable jobs for its own members, acted in fraud of the rights of plaintiff and the other Negro fireman and failed and refused to represent them fairly and impartially as was its duty as their representative under the Railway Labor Act.

On the date that said agreement and supplement went into effect the Railway operated passenger train service on its northern seniority district, running between Norfolk, Virginia, and Marsden, North Carolina. Two firemen were used in said service, one of whom was a white member of defendant Brotherhood and the other as a Negro fireman, non-member of the Brotherhood. Assignment to said service constituted one of the more preferred assignments available to locomotive firemen employed on the Railway. The hours were shorter and the work less arduous than that required of locomotive firemen who were assigned to other classes of service, particularly yard service. On or about June 1941, the white fireman who had been assigned to said [fol. 43] run, left it for another assignment, thereby creating a vacancy. In accordance with his individual contract of hiring plaintiff was assigned to said run. He worked said assignment with competence and skill and to the satisfaction of the Railway, until on or about October 10, 1941, when the Brotherhood again fraudulently and in breach of its duty as the representative under the Railway Labor Act of the entire craft or class of locomotive firemen, employed by the Railway, did wrongfully press said agreement and supplement and asserted that the plaintiff's assignment to said run was in breach thereof, and wrongfully induced and forced the Railway to remove plaintiff from said assignment and to assign defendant, W. M. Mundon, a member of the Brotherhood, to same. As a result, plaintiff has lost his assignment on said passenger run and valuable property rights that have accrued to him while in the service of the

Railway, and in order to continue in his employment, has been forced to accept and perform an assignment in yard service where he has to work longer hours and perform more difficult and arduous labor, and unless this Honorable Court grants relief he will be forced to continue to accept and perform more difficult and arduous labor and will suffer irreparable damage.

Plaintiff has requested the Railway to restore him to his assignment on the passenger train but the Railway asserts that under the provisions of the Railway Labor Act and said agreement entered into pursuant thereto, it is powerless to do so unless plaintiff's representative under the Railway Labor Act, the Brotherhood, demands it. Plaintiff has requested the Brotherhood as his representative to represent him before the management of the Railway for the purpose of having his assignment and property rights restored but said Brotherhood, in violation of its duty has failed and refused to represent him or even to acknowledge his request.

Plaintiff alleges that the matters and things complained of constitute an actual controversy between him and the class he represents on the one side and the defendants on [fol. 44] the other. The interests of plaintiff and the class he represents are adverse to the interests of the defendants and those they represent. The right of plaintiff and the class of which he is a member, to be represented fairly and impartially and in good faith by the representative under the Railway Labor Act of the entire class or craft of locomotive firemen employed on defendant Railway has been violated and denied and, as a result, damages incurred, and unless this Honorable Court will declare the rights, interests, and other legal relations of the respective parties, as provided for in Section 490, Title 28, United States Code, and Rule 57 of the Federal Rules of Civil Procedure, numerous vexatious disputes will arise between the parties hereto and those they represent, the plaintiff will suffer irreparable injury.

Plaintiff files as exhibits with his complaint, copies of documents which strongly support his allegations. In substance, he prays for a declaratory judgment holding the discrimination against him and other Negro firemen similarly situated to be arbitrary and illegal; for an injunction permanently restraining and enjoining the defendants from recognizing or enforcing the agreement and the supplement thereto, between the Brotherhood and the Railway, and en-

joining the Brotherhood from acting or purporting to act as plaintiff's representative so long as the Brotherhood refuses to represent him and other Negro firemen similarly situated, fairly and impartially, to enjoin the Brotherhood from continuing to use its position of bargaining agent to destroy the rights of plaintiff and other Negro firemen similarly situated, and for a judgment for damages against the Brotherhood because of its refusal fairly to represent him and for damages resulting from the destruction of his rights, and that his right to hold his assignment between Norfolk, Virginia, and Marsden, North Carolina, be restored and protected.

The defendants have filed a motion to dismiss upon the ground, among others, that this Court is without any jurisdiction [fol. 45] of the action alleged in the complaint. It definitely appears from the record that plaintiff, Tom Tunstall, and the defendants, or at least a majority of them, including the Railway, W. M. Mundén, and defendants alleged to be local agents of the Brotherhood, are citizens of Virginia, and that diversity of citizenship between plaintiff and defendants is lacking. Plaintiff bases his claim that this Court has jurisdiction of the action upon the alleged ground that a Federal question is involved, in that the decision of the case turns upon the construction of the *Railway Labor Act of Congress, June 21, 1934*, and upon U. S. C., Title 28, Sec. 41 (8).

The allegations of the complaint may be summarized as follows:

That pursuant to the provisions of the Railway Labor Act of 1934, the Brotherhood has been chosen and is the representative or bargaining agent of the craft or class of enginemen and firemen for the purpose of collective bargaining with the Railway, and has been and is acting as such; that the Brotherhood is composed of white members only and Negro firemen are excluded from membership therein; that a majority of the members of that craft or class are members of the Brotherhood, as a result of which, having a majority of all of the members of the craft or class, the Brotherhood has been selected as its bargaining agent; that under the Railway Labor Act the Brotherhood is sole bargaining agent and the Railway must treat with the Brotherhood only and can not treat with plaintiff or other minority firemen; that the law makes it the duty of the

Brotherhood as such bargaining agent of the craft or class to represent all members thereof fairly and impartially, without regard to whether they are or are not members of the Brotherhood, or minority members of the craft; and that the Brotherhood, acting in its capacity as bargaining agent, has failed and refused to represent the colored firemen fairly and impartially, but, on the contrary, has wrongfully and fraudulently used its position and power as bargaining agent to injure and destroy the rights of plaintiff and other Negro firemen similarly situated, for the benefit of Brotherhood's own members.

The question presented is whether or not the Railway Labor Act, after providing as it does, procedure for selecting a bargaining agent as sole representative of a craft or class and making it the duty of the Railway to recognize and treat with such bargaining agent, stops short without imposing any duty or obligation upon such bargaining agent to represent fairly and impartially the minority as well as the majority members of the craft or class, and without affording any remedy to the minority, in this instance the Negro firemen, for alleged wrongful and fraudulent misrepresentation such as is specifically and directly charged in the complaint.

To state the question another way, are the minority members of a craft or class given any remedy by the Railway Labor Act of 1934, for alleged wrongs committed by the bargaining agent; or is the minority relegated for relief to the law of the state or states in which the wrongs are alleged to have been perpetrated?

As already noted, the Railway Labor Act of 1934 provides for the members of a craft or class of an interstate railway to select a bargaining agent to represent that craft or class for the purpose of collective bargaining, and requires the Railway to recognize and treat with the agent so selected, *Virginian Railway Co. v. System Federation No. 40, etc.*, 309 U.S. 515, affirming *Fourth Cir.*, 84 Fed. 2d., 641, and the Railway can treat only with the agent selected by the craft or class, *Atlantic Coast Line R. Co. v. Pope*, *Fourth Cir.*, 119 Fed. 2d. 39. However, we search the Railway Labor Act in vain for any provision affording protection to the minority against wrongful, arbitrary or oppressive action of the majority through the bargaining agent which the majority has selected. The Act is silent in that respect. It stops short after providing for the selection of the bargaining

[fol. 47] agent, and imposing upon the Railway the duty to treat with that agent alone after he is selected. Numerous authorities were cited and quoted in the arguments, among them *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, 6th Cir. (1942), 127 Fed. 2d, 53. After a study of that decision, the Court has concluded that it is directly in point in the instant case, and in *Barnhart v. Western Maryland Ry. Co.*, 4th Cir., 128 Fed. 2d, 709, 714, our Circuit Court of Appeals, after discussing and reviewing the authorities generally as to when a Federal question is presented, referred to and quoted the Teague case, as follows:

"Quite in point here is the very recent case of *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, 6 Cir. 127 F. 2d, 53, decided April 9, 1942. That was an action by a railway firemen against the Brotherhood (which was designated as collective bargaining agent of his class under the Railway Labor Act) and the railroad, to set aside a collective bargaining agreement on the ground that this agreement was destructive of his vested rights of seniority preference. In the unanimous opinion of the Court, holding that the action did not arise under a federal law, Circuit Judge Simons, 127 F. 2d, 53, 56, said:

"Reverting to the appellant's own statement of his case, such rights as are here claimed arise from the individual contracts of the Negro firemen with the defendant Railroad. The appellant is unable to point to provision of the Railway Labor Act which protects such rights, or permits their invasion. The provisions of Sec. 2, subd. eighth makes the terms of the collective bargaining agreement a part of the contract of employment between the carrier and each employee—the case, nevertheless, remains one based upon a contract between private parties cognizable, if at all, under state law."

It is apparent in the light of these authorities that no Federal question is presented in the present case, and there [fol. 48] being a lack of diversity of citizenship between the plaintiff and defendants, it follows that the motion to dismiss will have to be sustained.

Luther B. Way, United States District Judge.

Norfolk, Virginia, April 15, 1943.

[fol. 49] IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA (NORFOLK DIVISION)

Civil Action No. 210

TOM TUNSTALL, Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Norfolk, Virginia, and Ocean Lodge, No. 76, Norfolk,
Virginia, and Port Norfolk Lodge, No. 775, Portsmouth,
Virginia, and W. M. Munden, 1123 Hawthorn Street,
Norfolk, Virginia, and Norfolk Southern Railway Com-
pany, a Corporation, *a Corporation*, Norfolk, Virginia,
Defendants.

DECREE OF DISMISSAL—May 7, 1943

This action came to be heard on March 4, 1943, upon the complaint, the motion of defendant Brotherhood of Locomotive Firemen and Enginemen, to dismiss the action under Rule 12 (b) of the Rules of Civil Procedure; the motion of defendant Ocean Lodge No. 76, Norfolk, Virginia, to dismiss the action and quash purported service of summons [fol. 50] under Rule 12 (b), the motion of Port Norfolk Lodge, No. 775, Portsmouth, Virginia, to dismiss said action under Rule 12 (b), the motion of defendant W. M. Munden to dismiss said action under Rule 12 (b), and motion of defendant Norfolk Southern Railway Company to dismiss said action, all of which motions were considered and fully argued and submitted to the Court on March 4, 1943. And the Court not being fully advised of its judgment, took time to consider.

And the Court being now fully advised of its judgment upon all the motions pending herein, is of the opinion that the said defendants, namely; Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, William M. Munden and the Norfolk Southern Railway Company, have been duly served and are properly before the Court; but, being of the opinion that no federal question is presented in this case, and that there is no jurisdiction in this Court to hear and decide this case, it is therefore Ordered, Adjudged and Decreed:

1. That the motion of the defendant Brotherhood of Locomotive Firemen and Enginemen to dismiss the

action against it on the ground that there has been no service of process upon said defendant, be, and the same is overruled.

2. That the motion of defendant Ocean Lodge No. 76, Norfolk, Virginia, to dismiss the action so far as concerns said defendant and to quash the purported service of summons upon said defendant, be, and the same is overruled.

3. That the said motions filed herein as aforesaid by Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, William M. Munden and the Norfolk Southern Railway Company, be and the same are hereby sustained in so far as the said motions are based upon a lack of jurisdiction in this Court.

[fols. 51-52] 4. That judgment be entered against the plaintiff, Tom Tunstall, and for the defendants, Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, W. M. Munden and Norfolk Southern Railway Company, and that plaintiff's complaint be and the same is hereby dismissed with costs to the defendants.

To the action of the Court in denying its motion to dismiss the action against it on the ground that it had never been served with summons, the defendant Brotherhood of Locomotive Firemen and Enginemen duly objected and excepted upon grounds fully stated to the Court; and to the action of the Court in denying its motion to dismiss the action as to it, and to quash the purported summons of service upon it, the defendant Ocean Lodge No. 76, Norfolk, Virginia, duly objected and excepted upon grounds fully stated to the Court; and to all of the actions of the Court in sustaining said motions of the defendants to dismiss the complaint and entering judgment against the plaintiff and for the defendants, the plaintiff duly objected and excepted upon grounds fully stated to the Court.

_____, United States District Judge.

Norfolk, Virginia, May 7, 1943.

[fol. 53] APPENDIX TO BRIEF OF APPELLEES, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775, AND W. M. MUNDEN

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, (NORFOLK DIVISION)

Civil Action No. 210

TOM PUNSTALL, Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Norfolk, Virginia,

and

OCEAN LODGE NO. 76, Norfolk, Virginia,

and

PORT NORFOLK LODGE NO. 775, Portsmouth, Virginia,

and

W. M. MUNDEN, 1123 Hawthorn Avenue, Norfolk, Virginia,

and

NORFOLK SOUTHERN RAILWAY COMPANY, a Corporation,
Norfolk, Virginia, Defendants

(Filed at Norfolk, Va., August 11, 1942)

Return of United States Marshal for the Eastern District of Virginia of Service of Summons and Complaint as to Defendant Brotherhood of Locomotive Firemen and Enginemen

[fol. 54] "Returned not executed as to the Brotherhood of Locomotive Firemen and Enginemen, no representation in this District."

R. L. Allworth, U. S. Marshal, by H. L. Trimyer,
Deputy U. S. Marshal.

Return of United States Marshal for the Eastern District of Virginia of Service of Summons and Complaint as to Defendant Ocean Lodge No. 76

"Not finding any representative of the within named Lodge (Ocean Lodge No. 76) I served a copy of the Summons together with a copy of the Complaint, by delivering same to Lucile Munden, she being the wife of W. M. Munden, and above the age of sixteen years and a member of his family at his regular place of abode at 4123 Hawthorne Avenue, South Norfolk, Va. for delivery to the within named W. M. Munden at his regular place of abode, a place within my District.

R. L. Ailworth, United States Marshal, by H. L. Trijiver, Deputy U. S. Marshal."

[fol. 55] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5125

TOM TUNSTALL, Appellant,

versus.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN; Ocean Lodge No. 76; Port Norfolk Lodge No. 775; W. M. Munden; and Norfolk Southern Railway Company, Appellees

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk

June 28, 1943, the transcript of record is filed and the cause docketed.

Same day, the appearance of Charles H. Houston is entered for the appellant.

Same day, the appearance of Wm. G. Maupin, Harold C. Heiss and Russell B. Day is entered for the appellees.

Same day, the appearance of James G. Martin is entered for the appellee Norfolk Southern Railway Company.

June 29, 1943, the appearance of Joseph C. Waddy is entered for the appellant.

Same day, statement under section 3 of rule 10 is filed.

September 14, 1943, brief and appendix on behalf of the appellant are filed.

September 28, 1943, brief and appendix on behalf of the appellees other than the Norfolk Southern Railway Company are filed.

September 29, 1943, brief on behalf of appellee Norfolk Southern Railway Company is filed.

[fol. 56] Argument of Cause

October 15, 1943, (October term, 1943) cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 57] PER CURIAM OPINION—Filed January 10, 1944

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5125

TOM TUNSTALL, Appellant,

VERSUS

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN; Ocean Lodge No. 76; Port Norfolk Lodge No. 775; W. M. Munden; and Norfolk Southern Railway Company, Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk

(Argued October 15, 1943. Decided January 10, 1944)

Before Parker, Soper and Dobie, Circuit Judges

Charles H. Houston and Joseph C. Waddy (Oliver W. Hill on brief) for Appellant; and William G. Maupin and James G. Martin (Harold C. Heiss and Russell B. Day on brief), for Appellees.

[fol. 58] PER CURIAM:

This is an appeal from an order dismissing a suit for lack of jurisdiction. Plaintiff is a Negro fireman employed by the Norfolk-Southern Railway Company and he brings the suit in behalf of himself and other Negro firemen em-

ployed by that company. The defendants are the railway company, the Brotherhood of Locomotive Firemen and Enginemen, certain subordinate lodges of that labor union and one of its officers. The gravamen of the complaint is that the union has been selected as bargaining agent of the firemen of the defendant railway company; that it excludes Negro firemen from membership; that it has negotiated a trade agreement with the company discriminating against Negro firemen; and that as a result of this agreement plaintiff has suffered discrimination with respect to seniority rights and has been damaged thereby. The relief asked is a declaratory judgment to the effect that the union as bargaining representative is bound to represent fairly and without discrimination all members of the craft, and injunction restraining the defendants from giving effect to the trade agreement in so far as it discriminates against Negro firemen and restraining the union from acting as bargaining representative of Negro firemen so long as it refuses to represent them fairly and impartially, an award against the union for damages sustained by plaintiff, and an order that plaintiff be restored to the position to which he would be entitled by seniority in absence of the contract.

There is no allegation of diversity of citizenship, and jurisdiction of the suit can be maintained only on the ground that the controversy is one arising under the laws of the United States. In so far as the suit is grounded on wrongful acts of the defendants, it cannot be said to be one arising under the laws of the United States, even though ~~(4059)~~ the union was chosen as bargaining representative pursuant to such laws. *Barnhart v. Western Maryland Ry. Co.*, 4 Cir., 128 F.2d 709; *Teague v. Brotherhood of Locomotive Firemen and Enginemen* 6 Cir., 127 F.2d 53. We have considered whether jurisdiction might not be sustained for the purpose of declaring the rights of plaintiff to the fair representation for the purposes of collective bargaining which is implicit in the provisions of the National Railway Labor Act. We think, however, that recent decisions of the Supreme Court hold conclusively that there is no jurisdiction in the federal courts to afford relief under the act except where express provisions of the ~~act~~ so indicate. *Brotherhood of R.R. S. S. Clerks etc. v. United Transport Service Employees of America* (decided Dec. 6, 1943) U. S. —; *Switchmen's Union of North America etc. v. Na-*

tional Mediation Board et al. (decided Nov. 22, 1943) — U. S. —, 64 S. Ct. 95; *General Committee etc. v. Southern Pac. Co.* (decided Nov. 22, 1943) — U. S. —, 64 S. Ct. 142; *General Committee etc. v. Missouri-Kansas-Texas Railroad Co. et al.* (decided Nov. 22, 1943) — U. S. —, 64 S. Ct. 146. In the case last cited, the Supreme Court, after commenting upon various provisions of the act and the machinery provided for their enforcement, said:

"The new administrative machinery plus the statutory commands and prohibitions marked a great advance in supplementing negotiation and self-help with specific legal sanctions in enforcement of the Congressional policy."

"But it is apparent on the face of the Act that while Congress dealt with this subject comprehensively, it left the solution of only some of those problems to the courts or to administrative agencies." It entrusted large segments of this field to the voluntary processes of conciliation, mediation, and arbitration. Thus by ~~sec.~~ 5, First, Congress provided that either party to a dispute might invoke the services of the Mediation Board in a "dispute concerning [fol. 60] changes in rates of pay, rules, or working conditions not adjusted by the parties in conference" and any other "dispute not referable" to the Adjustment Board and "not adjusted in conference between the parties or where conferences are refused." Beyond the mediation machinery furnished by the Board lies arbitration. See 5, First and Third, sec. 7. In case both fail there is the Emergency Board which may be established by the President under sec. 10. In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway-labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. *The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than*

"the express provisions of the Act indicate," (Italics supplied.)

Closely analogous to the case at bar is the case of *General Committee etc. v. Southern Pac. Co., supra.* That was a suit for declaratory judgment that provisions of an agreement between a carrier and a committee representing firemen concerning the demotion of engineers to firemen and the calling of firemen for service as emergency engineers were invalid under the Railway Labor Act. Complainants there based their right to relief upon the same provisions of the Act guaranteeing employees the right to bargain collectively through representatives of their own choosing as are relied on here; but the Court held that the questions presented were not justiciable issues under the Act. The Court said:

[fol. 61] "We are concerned only with a problem of representation of employees before the carriers on certain types of grievances which, though affecting individuals, present a dispute like the one at issue in the Missouri-Kansas-Texas R. Co. case. It involves, that is to say, a jurisdictional controversy between two unions. It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins. For the reasons stated in our opinions in the Missouri-Kansas-Texas R. Co. case and in the Switchmen's case, we believe that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts. We see no reason for differentiating this jurisdictional dispute from the others."

If the courts are without power under the provisions of the Act, relied on to declare a contract void because the association which negotiated it was not authorized to represent complainants, they are equally without power to make such declaration where the complaint is that it has not represented them fairly. If the courts may not under the act declare where the exclusive jurisdiction of one craft ends and the authority of another begins with respect to the right of collective bargaining, a fortiori they are with-

out power to declare the duties of a bargaining agent within the limits of his undoubted jurisdiction. It would be absurd to hold that the courts have power to declare a contract void because the bargaining agent has not properly and impartially represented different groups of employees, but are without power where he is not authorized to represent them at all. If the courts may not make a determination between conflicting rights of organized groups, it is difficult to see how their power should be extended by the mere fact that one of the groups is unorganized.

[fol. 62] The court here is asked, in enforcement of the provision of the Act that employees shall have the right to bargain collectively through representatives of their own choosing, to declare the duty of a representative admittedly chosen by a majority of the craft, and to interfere by injunction with the process of bargaining undertaken pursuant to the Act on the ground that the purposes of the Act are being violated. This, as we interpret the foregoing decisions of the Supreme Court, we have no power to do.

The decree dismissing the suit will be affirmed.

Affirmed.

[fol. 63] DECREE—Filed and Entered January 10, 1944

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5125

TOM TUNSTAL, Appellant,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS;
Ocean Lodge No. 76; Port Norfolk Lodge No. 775; W. M.
Minden; and Norfolk Southern Railway Company, Ap-
pellees

Appeal From the District Court of the United States for
the Eastern District of Virginia

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of dismissal of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

January 10, 1944.

John J. Parker, Senior Circuit Judge.

February 8, 1944, petition of appellant for a stay of the mandate is filed.

ORDER STAYING MANDATE PENDING APPLICATION FOR A WRIT OF CERTIORARI—Filed February 10, 1944

(Style of Court and Title Omitted)

Upon the Application of the Appellant, by his counsel, Joseph ~~W~~addie and Charles H. Houston, and for good cause shown,

It is Ordered that the mandate in this court in the above entitled cause be, and the same is hereby, stayed pending [feb 64] the application of the said Appellant in the Supreme Court of the United States for a writ of certiorari to this court, unless otherwise ordered by this or the said Supreme Court, provided said application is filed in the said Supreme Court within thirty days from this date.

February 9, 1944.

Armistead M. Dobie, U. S. Circuit Judge.

STIPULATION GOVERNING CONTENTS OF RECORD RE APPLICATION TO THE UNITED STATES SUPREME COURT FOR WRIT OF CERTIORARI—Filed March 7, 1944

(Style of Court and Title Omitted)

It is stipulated among counsel for all the respective parties that the record for use on application to the United States Supreme Court for writ of certiorari shall consist of the Appendix to the Appellant's Brief filed herein and the proceedings in the United States Circuit Court of Ap-

peals for the Fourth Circuit, and the appendix to the brief of appellees BLF&E filed therein.

Dated this 3rd day of March, 1944.

Joseph C. Waddy, Charles H. Houston, Attorneys for Appellant Tunstall, 615 F Street, N. W., Washington, D. C. Wm. G. Maupin, Attorneys for appellees Brotherhood of Locomotive Firemen & Enginemen; Ocean Lodge No. 76; Port Norfolk Lodge No. 775; and W. M. Mundon, Bank of Commerce Building, Norfolk, Virginia. Jas. G. Martin, Attorney for appellee Norfolk Southern Railway Company, Western Union Building, Norfolk, Virginia.

[fol. 65] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief for appellant; appendix to brief of appellees Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and W. M. Mundon; and the proceedings in the said Circuit Court of Appeals in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals; and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Appeals in said cause, made up in accordance with the stipulation of counsel, for use in the Supreme Court of the United States on an application for a writ of certiorari.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 7th day of March, A. D., 1944.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. By R. M. F. Williams, Jr., Deputy Clerk. (Seal.)



[fol. 66] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Charles H. Houston File No. 48,272 U. S. Circuit Court of Appeals, Fourth Circuit, Term No. 37, Tom Tunstall, Petitioner vs. Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, et al. Petition for a writ of certiorari and exhibit thereto. Filed March 10, 1944. Term No. 37 O. T. 1944.

(2554)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 779

TOM TUNSTALL.

Petitioner

AFFILIATED BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, OCEAN LODGE NO. 76, PORT NOR-
FOLK LODGE NO. 775, W. M. MUNDEN AND NOR-
FOLK SOUTHERN RAILWAY COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Charles H. Houston,

Counsel for Petitioner

Joseph L. Wallop,

Deaver W. Hill,

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OTHER AUTHORITIES CITED.

Borchard, Declaratory Judgments (2d Ed.), pp. 788-9	17
75th Cong. Rec. Vol. 75, part 5, pp. 4936-4937	17
Frankfurter and Greene, The Labor Injunction, p. 220	17
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O. F. Traylor, Railroad Labor Legislation of 1934, 29 Ill. L. Rev. 789	10
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 779

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Tom Tunstall respectfully prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above-entitled cause January 10, 1944, which affirmed a decree of the United States District Court, Eastern District of Virginia, dismissing petitioner's complaint on motion to dismiss thereint filed.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit, not yet reported, appears in the record at pages 55-59.

The opinion of the United States District Court, not reported, appears in the record at pages 36-48.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Section 347).

Statute Involved.

The statute involved is the Railway Labor Act (Act of May 20, 1926 as amended by the Act of June 20, 1934 (45 U. S. C. Sections 151-164), which is printed in the appendix.

Statement.

Petitioner, a Negro locomotive fireman employed by the Norfolk Southern Railway Company (hereinafter called the Railroad), sued the Railroad and the Brotherhood of Locomotive Firemen and Enginemen, an international unincorporated labor union, certain of its subordinate lodges and individual members (hereinafter collectively called the Brotherhood) (R. 1-23); in two counts which in substance showed:

COUNT I.

Petitioner is a member of the craft or class of locomotive firemen employed on respondent Railroad. At all times material herein the Brotherhood has been the representative under the Railway Labor Act of the entire craft or class of locomotive firemen employed on said Railroad. As such it had a duty under the Act to represent the members of the craft impartially; but it refused to represent plaintiff impartially but used its position to obtain the more favorable job assignments for its own members (R. 3). Petitioner is barred from membership in the Brotherhood solely because he is a Negro (R. 2). On October 10, 1941 petitioner was employed as fireman on a preferred interstate passenger run. The Brotherhood refused to represent him impartially but in order to obtain the position for one of its members wrongfully used its position as representative under the Act to induce and force the Railroad to remove him from his job and replace him with one of its own members (R. 2-4). Wherefore he sought damages in amount of \$25,000.00 against the Brotherhood (R. 4).

COUNT II.

Petitioner adopted the allegations of Count I, then showed that the Negro firemen constitute the minority firemen employed on the Railroad, the white firemen—all members of the Brotherhood—constitute the majority firemen; and that the Negro minority firemen and the white Brotherhood majority firemen constitute the entire craft or class of firemen on the Railroad. The Negro firemen are excluded from membership in the Brotherhood solely because of race (R. 6).

The white Brotherhood majority firemen have chosen the Brotherhood as the representative under the Railway Labor Act of the entire craft or class of firemen on the Railroad. The minority Negro firemen never chose the Brotherhood as their representative, but by virtue of their minority position have been forced to accept the Brotherhood as their representative under the Act (R. 6-7).

By accepting the position as representative under the Railway Labor Act of the entire craft or class of firemen on the Railroad, the Brotherhood became the statutory agent of the Negro minority firemen, under the duty of representing them fairly, impartially and in good faith, to give them reasonable notice and opportunity to be heard and a chance to vote on matters adversely affecting their interests, to make prompt report on actions taken affecting them, and to refrain from using its position as their statutory representative to discriminate against them in favor of itself and its members (R. 7). Nevertheless it has been persistently disloyal to the Negro minority members and has constantly sought to destroy their rights and drive them out of employment to obtain a monopoly of employment and the most favored jobs for its own members. It has always refused to give the Negro minority members notice, opportunity to be heard or vote,

or a report on matters affecting their interests, and has always refused to handle their grievances wherever there is an apparent conflict between them and its members, and has always refused to give them fair, impartial, honest and faithful representation under the Railway Labor Act (R. 7-8).

On March 28, 1940 the Brotherhood acting on each railroad involved as the representative under the Railway Labor Act of the entire craft or class of firemen, served notice on respondent Railroad and other railroads operating in the southeastern part of the United States, of its purpose to amend existing contracts governing firemen's rules, rates of pay and working conditions in such manner as would drive the Negro minority firemen completely out of service (R. 8; Appendix to Brief 51). On February 28, 1941, pursuant to said Notice, the Brotherhood acting in the premises as representative of the entire craft or class of firemen under the Act, and the railroads—including respondent Railroad—did enter into an agreement whereby the employment of Negro (nonpromotable) firemen and helpers on other than steam power should not exceed fifty per cent in each class of service in any seniority district, but not permitting their employment in any seniority district where they were not then working, and providing that until such percentage was reached all vacancies should be filled by white (promotable) firemen; and defining "nonpromotable" men as those not eligible for promotion under present rules and practices to the position of locomotive engineer. Under existing rules and practices only white firemen are eligible to promotion as engineers; Negro firemen are "non-promotables". (R. 8-9; Appendix to Brief 54). On May 23, 1941 the Brotherhood acting as representative under the Railway Labor Act of the entire craft or class of firemen and the respondent Railroad entered into a supplemental agreement,

specifically defining "non promotable firemen" as referring to Negro firemen only (R. 9; Appendix to Brief 61).

In serving the Notice of March 28, 1940, negotiating the Agreement of February 18, 1941 and the supplement of May 23, 1941, the Brotherhood gave the Negro firemen no notice, or opportunity to be heard or to vote thereon; nor was the existence of said agreement disclosed to them until the Brotherhood forced petitioner off his run by virtue thereof; but the Brotherhood maliciously contriving to secure a monopoly of employment and the most favorable jobs for its own members, acted in fraud of the rights of the Negro minority firemen and refused to represent them fairly and impartially as was its duty under the Railway Labor Act (R. 9-10).

On October 10, 1941 petitioner was serving to the satisfaction of the Railroad as fireman on an interstate passenger run, when the Brotherhood acting in the premises as representative under the Railway Labor Act of the entire craft or class of firemen, did wrongfully press said Agreement and supplement, and wrongfully induce and force the Railroad to remove petitioner and assign the job to the respondent Munden, a member of the Brotherhood; forcing petitioner to a more difficult and arduous job (R. 10-11).

Petitioner requested the Railroad to restore him to his job, but the Railroad asserted it was bound by the Railway Labor Act and helpless to do so unless the Brotherhood as his representative demanded same. Petitioner requested the Brotherhood as his representative to represent him before the Railroad for the restoration of his job but it refused to do so or even acknowledge his request (R. 11).

Petitioner sought a declaratory judgment declaring the relative rights and duties of the parties, and a declaration that the Brotherhood in accepting the position and acting

as the exclusive representative under the Railway Labor Act of the entire craft or class of firemen is under obligation to represent fairly and without discrimination all members of the craft or class, including the Negro minority firemen, non members of the Brotherhood; an injunction against the enforcement of the Agreement and supplement aforesaid; an injunction against the Brotherhood acting as his representative under the Railway Labor Act, so long as it refuses to represent him fairly and impartially; damages and restoration of his job (R. 12-13). Both the Railroad and the Brotherhood filed motions to dismiss (R. 25-35), which were sustained (R. 49-51).

Questions Presented.

1. Does the representative under the Railway Labor Act of an entire craft or class of firemen on a carrier have a duty to represent all members of the craft or class, including the minority firemen, fairly and impartially?
2. If there is such a duty, is there jurisdiction in the Federal Courts to declare the relative rights and duties between the representative and the members of the craft or class it represents under the Railway Labor Act, and to redress wrongs resulting from a violation of said duty?

Reasons for Granting the Writ.

1. The United States Circuit Court of Appeals held the "rights of plaintiff to the fair representation for purposes of collective bargaining is *implicit* (italics ours) in the provisions of the National Railway Labor Act" but declined jurisdiction on what it considered controlling precedents established in this Court:

Brotherhood of Ry., and S. S. Clerks v. U. T. S. E. A.
(decided December 6, 1943) — U. S. —;

Switchmen's Union v. National Mediation Board (decided November 22, 1943) 320 U. S. 297;

General Committee etc., v. Southern Pacific Company
 (decided November 22, 1943) 320 U. S. 338;

General Committee etc., v. M. K. T. Railroad Co. (decided November 22, 1943) 320 U. S. 323.

These decisions are not controlling and do not reach the questions here involved.

2. There is no administrative tribunal or agency established under the Railway Labor Act with jurisdiction to afford minority workers an opportunity to be heard and redress against wrongs and oppression from the majority workers who have seized the bargaining rights and grievance representation for the entire craft or class by virtue of the Railway Labor Act.

3. The uniformity of interstate operating conditions on carriers would be destroyed if definition of the rights and duties of the craft representative under the Railway Labor Act were to be left to the variations of state decisions.

4. The questions involved affect not only Negroes but all minority workers in the railway industry, and consequently the whole condition of interstate commerce throughout the nation.

5. Unless this controversy is decided by the peaceable processes of the Courts it will lead to industrial warfare and paralysis of the war effort.

WHEREFORE, petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered herein January 10, 1944.

Respectfully submitted,

CHARLES H. HOUSTON,
Attorney for petitioner.

JOSEPH C. WADDY,

OLIVER W. HILL,

Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

We refer to the foregoing petition for a citation of the opinion below, statement of grounds of jurisdiction, citation of statute involved and a summary statement of the case.

Specification of Error.

The United States Circuit Court of Appeals for the Fourth Circuit erred in holding there was no jurisdiction in the Federal Court to afford relief to petitioner on the case stated.

Summary of Argument.

1. The Railway Labor Act imposes a duty on the representative under the Railway Labor Act of an entire craft or class of workers to represent all members of the craft fairly and impartially.
2. The Federal Courts have jurisdiction to declare such duty and grant redress for its violation where the representative misrepresents the minority workers.
3. The decisions of this Court relied on by the United States Circuit Court of Appeals are not controlling authority against Federal jurisdiction in the premises.
4. The Norris-LaGuardia Act does not prevent injunctive relief on the case stated.
5. If the Railway Labor Act grants the "Representative" the unbridled power to destroy the minority's right to earn a living it violates the due process clause of the Fifth Amendment and is unconstitutional.

Argument.

The Railway Labor Act imposes a duty on the representative under the Railway Labor Act of an entire craft or class of workers to represent all members of the craft fairly and impartially.

The Railway Labor Act does not blueprint the powers and duties of the representative under the Act of an entire craft or class of workers. As far as the majority workers are concerned this is perhaps unimportant. They have the power to designate the representative in the first instance (Section 2—Fourth); and the power to change the representative at any time (Section 2—Ninth). To the minority worker, however, a definition of the powers and duties of the representative is a matter of economic life or death. *Ex hypothesi* the minority can neither designate the representative nor change it. The representative by force of the Act becomes the exclusive bargaining agent and grievance representative for the entire craft or class.

Virginian Ry. v. System Federation, 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592 (1937).

The only way for the minority workers to shake off the representative is to resign from his job. Therefore unless there is a restraint imposed by the Act on the powers of the representative and unless duties are imposed on the representative for the protection of the minority worker, the Railway Labor Act has imposed on the minority worker, white as well as black, a condition of slavery in the teeth of the Thirteenth Amendment. It is no answer to say the minority worker is not forced to remain on his job but may resign at any time. A minority worker over 50 years of age with years of seniority cannot quit railroading and look for another occupation. Nor can Congress confer on the majority workers in a craft an unbridled power to force him

to do so, or to take away his job at their whim or to their own selfish advantage. The minority worker, just as much as the majority worker, has a vested property right in his job.

Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131 (1915);
Estes v. Union Terminal Co., 89 F. (2d) 768, 770 (1937);
Nord v. Griffin, 86 F. (2d) 481, 484 (1936);
Piercey v. L. & N. Railroad Co., 198 Ky. 477, 484, 248
S. W. 1042, 33 A. L. R. 322 (1923).

The Act expressly recognizes that the contract of employment of each worker is an individual contract (Sec. 2—Eighth).

The fact is that the legislative history, the purposes and structure of the Act establish by plain intendment limitations on the power of the representative for the protection of the minority workers.

For discussion of the history of the Federal railway labor acts, see

1. The National Mediation Board, First Annual Report.
2. O. F. Traylor, Railroad Labor Legislation of 1934, 29 Ill. L. Rev. 789 (Feb. 1935).
3. Kent T. Healy, Economics of Transportation, Ch. XVI (1940).

The Act specifically prohibits making a worker agree to join or not to join a labor union as a condition of employment (Sec. 2).

The Act aims at the making and maintenance of agreements concerning rates of pay, rules and working conditions and settlement of disputes between carriers and their employees. The high contracting parties are the carriers on the one hand and the employees on the other; but they act through representatives (Sec. 2—Second).

The structure of the Act is laid upon the precepts of agency. The employees and the carriers are recognized as

the principals: the representative is recognized as agent. The representative is defined by the Act "as a person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees *to act for it or them*" (Sec. 1—Sixth; italics ours). Representatives shall be designated by the parties (Sec. 2—Third). Employees shall have the right to organize and bargain collectively through *representatives* of their own choosing (Sec. 2—Fourth). The majority workers *pro se* do not have the right to bargain for the minority workers. The majority workers merely have the right to determine who shall be *the representative of the craft or class*" (Sec. 2—Fourth; italics ours). Once chosen, the representative of the craft speaks with the authority of and is responsible to the entire craft; just as once a political election is determined, the successful candidate becomes the spokesman not of his party but of the entire governmental unit with duty of equal protection to every person therein: his opponents as well as his supporters.

Since the very theory of unit bargaining which the Act establishes for the railway industry on a craft or class basis is pinned to the tenets of agency, the very use of the term "representative" as defined in the Act incorporates the duties and responsibilities of an agent into the powers conferred on the representative under the Act. The duties of an agent for several principals to be fair and impartial, not to seek an advantage for itself at the expense of one or more of its principals, to make full disclosure of actions proposed and actions taken, and to be loyal not hostile are so firmly established in the law as to make citation unnecessary. They attach to the representative under the Railway Labor Act as firmly as if they had been put in the black letter text of the Act.

The "representative" under the Railway Labor Act does not represent the craft by any hundred per cent authority

delegated from the craft. The Negro minority members have never chosen the Brotherhood their representative. The Brotherhood acts in spite of them by virtue of authority and power over them delegated to it by Congress. This Court must assume that Congress acted within the framework of constitutional limitations and so interpret the Act if possible. Congress could act within constitutional limitations only if it made the representative the agent of the minority as well as of the majority of the craft or class. It could not make the minority workers economic serfs either to the majority workers or to the representative in its independent capacity without violating both the Fifth and Thirteenth Amendments.

The Statement of the case shows the particulars wherein the Brotherhood as representative under the Railway Labor Act of the entire craft or class of firemen on respondent Railroad has violated the implied duties to the Negro minority workers imposed on it by the Act.

II.

The Federal Courts have jurisdiction to declare such duty and grant redress for its violation where the representative misrepresents the minority workers.

We approach the problem of Federal jurisdiction in the premises by elimination. (1) This is not a representation dispute as in *Brotherhood of Rwy. & S. Clerks v. U. T. S. E. A. and Switchmen's Union v. National Mediation Board, supra.* (2) It is not a jurisdictional dispute between two labor unions, as in *General Committee etc. v. Southern Pacific Company et al., supra.* (3) It is not a question of determining jurisdiction as between overlapping crafts, as in *General Committee etc. v. M. K. T. R. Company et al., supra.* (4) It does not involve a review of action by an administrative agency established under the Railway Labor

Act, as for example the National Mediation Board's ruling in *Brotherhood of Ry. & S.S. Clerks v. U. T. S. E. A., supra.* It is not a question of interpreting a contract; both the Agreement of February 18, 1941 and the supplement of May 23, 1941 are clear and nobody is in doubt as to the meaning thereof.

In the present case representation on the part of the Brotherhood under the Railway Labor Act of the entire craft or class of firemen on the respondent Railroad is conceded. The questions involved are not inter-craft but *intra-craft*. The basic complaint involves a dispute intra-craft between employees: between the white majority firemen, all members of the Brotherhood, and the Brotherhood on the one hand, and the Negro non-member minority firemen on the other.

No administrative machinery is provided within the Railway Labor Act for handling such disputes, so that there is no question of Congress having established any special exclusive procedural devices for notice, hearing and disposition. The jurisdiction of the National Railroad Adjustment Board is limited to disputes between employees and the carrier (Sec. 3—First (i)); similarly as to any system, group or regional boards established under the Act by mutual agreement between employees and the carriers (Sec. 3—Second). The jurisdiction of the National Mediation Board does not cover this field where no representation dispute is involved (Sec. 2—Ninth; Sec. 5). The arbitration machinery provided by the Act likewise is unavailable (Secs. 5-10 inclusive). In short, the Railway Labor Act has entombed the minority worker without hope of resurrection unless judicial relief is available.

It should be noted that Congress has established elaborate procedural safeguards, with full opportunity of notice and hearing, through the determination of the question who represents the craft or class (Sec. 2—Ninth).

Congress has established stringent, restrictive procedures regulating the procedures of collective bargaining (Secs. 2, 4-6).

Disputes between carriers and their employees have procedural channels marked out for them (Secs. 2, 3, 7-9).

But no procedure is provided for regulating intra-craft disputes between the majority workers and the representative of the entire craft or class on the one hand and the minority workers on the other. Congress has not employed "the traditional instruments of mediation, conciliation and arbitration" in this area. Cf. *General Committee etc. v. M.K.T.R. Co.*, *supra*, 64 S. Ct. 146 at p. 150.

Respondents' position is that this *casus omissus* means Congress has imposed no limitations on the conduct of the bargaining agent. Our position is that Congress has limited the powers of the representative through the language of the Act itself which adopts the principles of agency, and that such limitations may be enforced through the general jurisdiction of the Federal Court, as set out in Judicial Code, See. 24 (8), 28 U. S. C. See. 41 (8).

The Federal Courts have taken jurisdiction to enforce the Act although power was not specifically granted to the Courts within the confines of the Act. For example, *Virginian Rwy. v. System Federation*, 300 U. S. 515, *supra* rests on no specific grant of power. *Nord v. Griffin*, 86 F. (2d) 481, 51936), cert. denied 300 U. S. 673, 81 L. Ed. 879, 57 S. Ct. 612 (1937) enjoined an award of the National Railroad Adjustment Board on the ground of violation of due process, in the teeth of the Act which limits court review of actions of the Adjustment Board to an enforcement suit by the winning party. (See. 3—First (pl)). The *M.K.T.R. Co.* case *supra* concedes that Sec. 2—Fourth is judicially enforceable without specific grant of jurisdiction. Congress cannot cut off the right of review by the courts where the question of the constitutionality of the Statute is raised.

See *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. Ed. 185 (1885).

The *Virginian Ry. Case* and *Nord v. Griffin* completely dispose of the contention of the Circuit Court of Appeals that there is no jurisdiction in the Federal courts to afford relief under the Act except where express provisions of the Act so indicate.

This Court has struck down "intolerable and unconstitutional interference with personal liberty and private property" by Congress in subjecting a minority to unrestrained control by the majority of an industry.

Carter v. Carter Coal Co., 298 U. S. 238, 311; 80 L. Ed. 1160, 1189, (1936).

The same principles must apply to the present case if the minority workers are subjected by Congress to the unrestrained domination by the majority with no standards established. This would not only be a violation of the Fifth and Thirteenth Amendments, but would also amount to an unconstitutional delegation of legislative power. Congress cannot choke off judicial review of such a claim.

III.

The decisions of this Court relied on by the United States Circuit Court of Appeals are not controlling authority against Federal jurisdiction in the premises.

The argument under this point has been covered by what has gone before. It is our position that (1) the cases cited by the Circuit Court of Appeals (R. 56-57) relate to other problems and are governed by different considerations already discussed and (2), the concession by this Court in the *M. K. T. R. Co.* case *supra* that the right of the employees to organize, to be represented by representatives of their own choosing, and to bargain collectively is enforceable by judicial decree, must give the minority workers a judicially enforceable right to protect and advance the

right to organize, select representatives of their own choosing and bargain collectively (1) where the minority workers cannot organize with the majority workers because they are barred by race from the union to which the majority workers belong and which they have designated as the representative under the Railway Labor Act of the entire craft or class; (2) where it stands admitted of record that the representative refuses to give the minority workers any opportunity to participate in the formation of collective bargaining policy or strategy; and (3) where it stands admitted of record that the bargaining agent without notice or hearing to the minority has used its position to bargain collectively with the carrier to impair the minority workers' seniority rights and curtail their jobs to the advantage and profit of the majority workers, its own members.

If this right of organization and collective bargaining is conceded by this Court, then the right must appertain to every individual member of the craft, minority as well as majority member. Constitutional rights pertain to the individual and are not dependent on numbers.

McCabe v. A. T. & S. F. R. Co., 235 U. S. 151, 161, 39 L. Ed. 169, 174 (1914)

Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 83 L. Ed. 208 (1938)

Mitchell v. U. S., 313 U. S. 86, 85 L. Ed. 1201 (1941)

The relief sought here is in furtherance of the rights of organization, representation and collective bargaining under the Act. We do not contend the Court can grant the minority membership in the Brotherhood, but it can force the Brotherhood to give the minority an opportunity to be heard on questions of collective bargaining policy whenever and wherever it acts as representative under the Railway Labor Act of the entire craft or class.

See Groner, J. in *Brotherhood of Ry. & S.S. Clerks v. U. T. S. E. A.*, 137 F. (2d) 817, 822 (1943).

IV.

The Norris-LaGuardia Act does not prevent injunctive relief on the case stated.

The interpretation and construction of the provisions of the Railway Labor Act are appropriate subjects of declaratory relief.

Borchard; Declaratory Judgments (2nd ed.) pp. 788-9.

The Norris-LaGuardia Act (29 U. S. ch. 6) does not apply to declaratory judgments.

Frankfurter and Greene, *The Labor Injunction*, p. 220 hence we lay aside the question of declaratory relief.

The Norris-LaGuardia Act does not prevent an injunction in furtherance of the right of organization, selection of representative, and collective bargaining under the Railway Labor Act.

Virginia Ry. v. System Federation, supra.

See also Senate debate on the bill and statements of Senators Norris, Blaine and Wheeler, (75th Cong. Record vol. 75, part 5, pp. 4936-4937).

V.

If the Railway Labor Act Grants the "Representative" the unbridled power to destroy the minority's right to earn a living it violates the due process clause of the Fifth Amendment and is unconstitutional.

The argument under this point has already been made. Petitioner does not want to attack the Railway Labor Act. He recognizes and subscribes to its purposes within constitutional limitations and sincerely hopes it will not be so construed as to make an attack on its constitutionality mandatory in self-preservation.

Conclusion.

The issues in the present case involve the very structure of the collective bargaining process, the theory of representative government, and the rights of hundreds of thousands of workers. The case is one of first impression except for a decision of the Alabama Supreme Court in *Steele v. L & N R. Co.*, 168 S^{2d}. (2d) 416 (January 22, 1944) on which application to this Court for certiorari will be made on or before March 29, 1944.

It is respectfully urged that this Court issue its writ of certiorari to review the judgment complained of.

CHARLES H. HOUSTON,
Attorney for Petitioner.

JOSEPH C. WADDY,

OLIVER W. HILL,

Of Counsel.

APPENDIX.

The Railway Labor Act (U. S. Code, Title 45, Ch. 8).

RAILROADS, EXPRESS AND SLEEPING CAR COMPANIES

§ 151. Definitions; "Railway Labor Act"

When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to chapter 1 of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal; the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the district court of the United States for the District of Columbia; and the term "circuit court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act" (May 20, 1926, c. 347, § 1, 44 Stat. 577; June 7, 1934, c. 426, 48 Stat. 926; June 21, 1934, c. 691, § 1, 48 Stat. 1185; June 25, 1936, c. 804, 49 Stat. 1921; Aug. 13, 1940, c. 664, §§ 2, 3, 54 Stat. 785, 786.)

§ 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (May 20, 1926, c. 347, § 2, 44 Stat. 577, as amended June 21, 1934, c. 691, § 2, 48 Stat. 1186.)

§ 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in any effort

to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carriers, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*,

That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers or agents shall change the rates of pay, rules or working conditions of its employees; as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this chapter.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to

the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000 nor more than \$20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations

thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent. (May 20, 1926, c. 347, § 2, 44 Stat. 577, as amended June 21, 1934, c. 691, § 2, 48 Stat. 1186.)

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards

There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this chapter.

(b) The carriers, acting back through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the

claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

[fol. 18b] (g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, fire-men, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad shop laborers. This division shall consist of ten members, five of whom shall be selected by the

carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers, or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

- (r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.
- (s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at the place of meeting.
- (t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.
- (u) The Adjustment Board shall meet within forty days after June 21, 1934 and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice-chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired terms by the selection of a successor from the same group.
- (v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each divi-

sion of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board.

Second: Establishment of system, group or regional boards by voluntary agreement.

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjust-

ment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board. May 20, 1926, c. 347, § 3, 44 Stat. 578, as amended June 21, 1934, c. 691, § 3, 48 Stat. 1189.

§ 154. National Mediation Board

First. Board of Mediation abolished; National Mediation Board established; composition; term of office; qualifications; salaries; removal

The Board of Mediation is abolished, effective thirty days from June 21, 1934, and the members, secretary, officers, assistants, employees, and agents thereof, in office upon June 21, 1934, shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this chapter had not been passed. There is established, as an independent agency in the executive branch of the Government, a board to be known as the "National Mediation Board", to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. The terms of office of the members first appointed shall begin as soon as the members shall qualify, but not before thirty days after June 21, 1934, and expire, as designated by the President at the time of nomination, one on February 1, 1935, one on February 1, 1936, and one on February 1, 1937. The terms of office of all successors shall expire three years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board. Two of the members in office shall constitute a quorum for the transaction of the business of the Board. Each member of the Board shall receive a

salary at the rate of \$10,000 per annum, together with necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while away from the principal office of the Board on business required by this chapter. No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board.

All cases referred to the Board of Mediation and unsettled on June 21, 1934, shall be handled to conclusion by the Mediation Board.

A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.

Second. Chairman; principal office; delegation of powers; oaths; seal; report.

The Mediation Board shall annually designate a member to act as chairman. The Board shall maintain its principal office in the District of Columbia; but it may meet at any other place whenever it deems it necessary so to do. The Board may designate one or more of its members to exercise the functions of the Board in mediation proceedings. Each member of the Board shall have power to administer oaths and affirmations. The Board shall have a seal which shall be judicially noticed. The Board shall make an annual report to Congress.

Third. Appointment of experts; and other employees; salaries of employees; expenditures.

The Mediation Board may (1) appoint such experts and assistants to act in a confidential capacity and subject to the provisions of the civil-service laws, such other officers and employees as are essential to the effective transaction of the work of the Board; (2) in accordance with sections 661 to 674 of Title 5, fix the salaries of such experts, assistants, officers, and employees; and (3) make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law

books, periodicals, and books of reference, and for printing and binding; and including expenditures for salaries and compensation, necessary traveling expenses and expenses actually incurred for subsistence, and other necessary expenses of the Mediation Board, Adjustment Board, Regional Adjustment Boards established under paragraph (w) of section 153 of this chapter, and boards of arbitration, in accordance with the provisions of this section and sections 153 and 157 of this chapter, respectively), as may be necessary for the execution of the functions vested in the Board, in the Adjustment Board and in the boards of arbitration, and as may be provided for by the Congress from time to time. All expenditures of the Board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

Fourth. Delegation of powers and duties.

The Mediation Board is hereby authorized by its order to assign, or refer, any portion of its work, business, or functions arising under this chapter or any other Act of Congress, or referred to it by Congress or either branch thereof, to an individual member of the Board or to an employee or employees of the Board to be designated by such order for action thereon, and by its order at any time to amend, modify, supplement, or rescind any such assignment or reference. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Board. In conformity with and subject to the order or orders of the Mediation Board in the premises, [and] such individual member of the Board or employee designated shall have power and authority to act as to any of said work, business, or functions so assigned or referred to him for action by the Board.

Fifth. Transfer of officers and employees of Board of Mediation; transfer of appropriation.

All officers and employees of the Board of Mediation (except the members thereof, whose offices are hereby abolished) whose services in the judgment of the Mediation Board are necessary to the efficient operation of the Board are hereby transferred to the Board, without change in classification or compensation; except that the Board

to provide for the adjustment of such classification or compensation to conform to the duties to which such officers and employees may be assigned.

All unexpended appropriations for the operation of the Board of Mediation that are available at the time of the abolition of the Board of Mediation shall be transferred to the Mediation Board and shall be available for its use for salaries and other authorized expenditures. (May 20, 1926, c. 347, § 4, 44 Stat. 579, as amended June 21, 1934, c. 691, § 4, 48 Stat. 1193.)

§ 155. Functions of Mediation Board

First: Disputes within jurisdiction of Mediation Board.
The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

- (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
- (b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this chapter) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the

intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this chapter, no change shall be made in the rates of pay, rules, or working conditions, or established practices in effect prior to the time the dispute arose.

Second. Interpretation of agreement

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents

The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 157 of this chapter:

(a) On failure of the arbitrators named by the parties to agree on the retaining arbitrator or arbitrators within the time set by section 157 of this chapter, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this chapter, shall be removed by such Board as provided by this chapter, or if such an arbitrator refuses or is unable to serve, it shall

be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this chapter for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this chapter. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a circuit court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record

filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934 every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April, 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession. (May 20, 1926, c. 347, § 5, 44 Stat. 580, as amended June 21, 1934, c. 691, § 5, 48 Stat. 1195.)

§ 156. Procedure in changing rates of pay, rules, and working conditions.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this chapter, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. (May 20, 1926, c. 347, § 6, 44 Stat. 582, as amended June 21, 1934, c. 691, § 6, 48 Stat. 1197.)

§ 157. Arbitration.

First. Submission of controversy to arbitration. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.*

Second. Manner of selecting board of arbitration. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. Board of arbitration: organization; compensation; procedure: (a) Notice of selection or failure to select arbitrators. When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this chapter, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

(b) Organization of Board; procedure. The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however,* That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

(c) Duty to reconvene; questions considered. Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board

of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) Competency of arbitrators. No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Compensation and expenses. Each member of any board of arbitration created under the provisions of this chapter named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) Award; disposition of original and copies. The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as herein-after provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board,

to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under chapter 1 of Title 49.

(g) Compensation of assistants to board of arbitration: expenses; quarters. A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; compulsion of witnesses; fees. All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted, to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he hereby is, authorized, and it shall be his duty, to issue such subpoenas. In the event of the failure of any person to comply with any such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to pro-

duce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in chapter 1 of Title 49.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena. (May 20, 1926, c. 347, § 7, 44 Stat. 582, as amended June 21, 1934, c. 691, § 7; 48 Stat. 1197.)

§ 158. Agreement to arbitrate; form and contents; signatures and acknowledgment; revocation. The agreement to arbitrate—

- (a) Shall be in writing;
- (b) Shall stipulate that the arbitration is had under the provisions of this chapter;
- (c) Shall state whether the board of arbitration is to consist of three or of six members;
- (d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public; the clerk of a district court or circuit court of appeals of the United States, or before a member of the Mediation Board and, when so acknowledged, shall be filed in the office of the Mediation Board;
- (e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;
- (f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;
- (g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided*, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked

by a party to such agreement: *Provided, however,* That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this chapter, delivered to such board of arbitration. (May 20, 1926, c. 347, §§ 44 Stat. 584, as amended June 21, 1934, c. 691, § 7, 48 Stat. 1197.)

§ 139. Award and judgment thereon; effect of chapter on individual employee

First. Filing of award. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. Conclusiveness of award; judgment. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Impeachment of award; grounds. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

- (a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;
- (b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or
- (c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a

party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration:

Provided, however, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter:

Provided, further, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. Effect of partial invalidity of award. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of validity, but shall determine that a part of the award is valid, the court shall set aside the entire award; *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. Appeal; record. At the expiration of ten days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. Finality of decision of circuit court of appeals. The determination of said circuit court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. Judgment where petitioner's contentions are sustained. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award

in whole or; if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Eighth. Duty of employee to render service without consent; right to quit. Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent. (May 20, 1926, c. 347, § 9, 44 Stat. 585.)

§ 160. Emergency Board. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter, and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable; *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose. (May 20, 1926, c. 347, § 10, 44 Stat. 586, as amended June 21, 1934, c. 691, § 7, 48 Stat. 1197.)

§ 161. Effect of partial invalidity of chapter.

If any section, subsection, sentence, clause, or phrase of this chapter is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this chapter. All Acts or parts of Acts inconsistent with the provisions of this chapter are repealed. (May 20, 1926, c. 347, § 11, 44 Stat. 587; June 21, 1934, c. 691, § 8, 48 Stat. 1197.)

§ 162. Appropriation. There is hereby authorized to be appropriated such sums as may be necessary for expenditure by the Mediation Board in carrying out the provisions of this chapter. (May 20, 1926, c. 347, § 12, 44 Stat. 587, as amended June 21, 1934, c. 691, § 7, 48 Stat. 1197.)

§ 163. Repeal of prior legislation; exception. Chapters 6 and 7 of this title, providing for mediation, conciliation, and arbitration, and all Acts and parts of Acts in conflict with the provisions of this chapter are repealed, except that the members, secretary, officers, employees, and agents of the Railroad Labor Board, in office on May 20, 1926, shall receive their salaries for a period of 30 days from such date, in the same manner as though this chapter had not been passed. (May 20, 1926, c. 347, § 14, 44 Stat. 587.)

§ 164. Repealed. Oct. 16, 1940, c. 851, § 4, 54 Stat. 1111.

**BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN****GENERAL GRIEVANCE COMMITTEE****RAILWAY**

March 28, 1940.

Mr.

Dear Sir:

This is to advise that the employees of the Railway engaged in service, represented and legislated for by the Brotherhood of Locomotive Firemen and Enginemen, have approved the presentation of request for the establishment of rules governing the employment and assignment of locomotive firemen and helpers, as follows:

1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.
2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.
3. When permanent vacancies occur or established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.
4. It is understood that promotable firemen or helpers on other than steam power are those in line for promotion under the present rules and practices to the position of locomotive engineer.

In accordance with the terms of our present agreement, and in conformity with the provisions of the Railway Labor Act, kindly accept this as the required official notice of our desire to revise the agreement to the extent indicated.

The same request is this date being presented on the following railroads:

- Atlantic Coast Line
- Jacksonville Terminal
- Atlanta Joint Terminal
- Atlanta & West Point
- Western Railroad of Ala.
- Central of Georgia
- Frankfort & Cincinnati
- Georgia Railroad
- Georgia & Florida
- Gulf, Mobile & Northern
- Louisville & Nashville
- Memphis Union Station Co.
- Louisiana and Arkansas
- Mobile and Ohio, Columbus
& Greenville
- Norfolk and Portsmouth
Belt
- Norfolk & Southern
- Norfolk & Western
- Seaboard Airline
- Southern Railroad System
- St. Louis-San Francisco
- Tennessee Central

It is our request that all lines or divisions of railway controlled by the ~~Railway~~ shall be included in settlement of this proposal and that any agreement reached shall apply to all alike on such lines or divisions.

It is desired that reply to our proposal be made in writing to the undersigned on or before April 7, concurring therein, or fixing a date within 30 days from date of this letter when conference with you may be had for the purpose of discussing the proposal. In event settlement is not reached in

conference, it is suggested that this railroad join with others in authorizing a conference committee to represent them in dealing with this subject. In submitting this proposal we desire that it be understood that all rules and conditions in our agreements not specifically affected by our proposition shall remain unchanged subject to change in the future by negotiations between the proper representatives as has been the same in the past.

Yours truly,

(Signed) GENERAL CHAIRMAN.

AGREEMENT

Between the Southeastern Carriers' Conference Committee
Representing the

Atlantic Coast Line Railway Company,

Atlanta & West Point Railroad Company and Western Rail-
way of Alabama.

Atlanta Joint Terminal

Central of Georgia Railroad Company

Georgia Railroad

Jacksonville Terminal Company

Louisville & Nashville Railroad Company

Norfolk & Portsmouth Belt Line Railroad Company

Norfolk Southern Railroad Company

St. Louis-San Francisco Railway Company

Seaboard Air Line Railway Company

Southern Railway Company (including State University
Railroad Company and Northern Alabama Railway Com-
pany)

The Cincinnati, New Orleans, and Texas Pacific Railway
Company

The Alabama Great Southern Railroad Company (including
Woodstock and Blanton Railway Company and Belt Rail-
way Company of Chattanooga).

New Orleans and Northeastern Railroad Company

New Orleans Terminal Company

Georgia Southern and Florida Railway Company

St. Johns River Terminal Company

Harriman and Northeastern Railroad Company

Cincinnati, Burnside and Cumberland River Railway Com-
pany

Tennessee Central Railway Company

and the

Brotherhood of Locomotive Firemen and Enginemen

- (1) On each railroad party hereto the proportion of non-
promotable firemen, and helpers on other than steam power,

shall not exceed fifty per cent in each class of service established as such on each individual carrier. This agreement does not sanction the employment of non-promotable men on any seniority district on which non-promotable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2) (a) and (2) (b) men now holding seniority as firemen, or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. & E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provisions.

(6) All persons hereafter hired as firemen shall be required, in addition showing, in the opinion of the management, reasonable proficiency, to take within stated periods to be fixed by the three years, two examinations to be prepared by management and to be applied to all alike to test their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

Firemen hereafter hired declining to take or failing to pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall, when there is need for additional engineers, be promoted to such position, and will establish a seniority date as engineer in accordance with the rules contained in the agreements on the individual railroads.

When rules for conduct of examinations for promotion are included in current schedules, such rules shall apply. In the absence of such rules firemen failing to pass will be given a second trial within a period of three months and if they fail to pass on the second trial will be given a third trial within a period of three months.

Promotable firemen declining to take examinations for promotion, or who fail in their efforts to successfully pass the same, shall be dropped from the service.

All promotable firemen now in the service physically qualified, who have not heretofore been called for examination for promotion, or who have not waived promotion, shall be called in their turn for promotion. When so called, should they decline to take such examination for promotion or fail to pass as herein provided, they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers on other than steam power to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers.

(8) This agreement shall become effective February 22, 1941.

Signed at Washington, D. C., this 18th day of February, 1941.

For the Carriers:

SouthEastern Carriers' Conference Committee

C. D. MACKAY, *Chairman*

C. D. MACKAY

H. A. BENTON

C. G. SIBLEY

Committee Members

For the Employees:

Brotherhood of Locomotive Firemen and Enginemen

D. B. ROBERTSON, *President*

Brotherhood of Locomotive Firemen and Enginemen's Committee

W. C. METCALF, *Chairman*

²Supplementary Agreement Effective February 22, 1941, to the agreement between The Norfolk Southern Railroad Company and The Brotherhood of Locomotive Firemen and Enginemen dated September 1, 1928.

The purpose of this supplementary agreement is to incorporate as a part of the agreement dated September 1, 1928, between the Norfolk Southern Railroad Company and The Brotherhood of Locomotive Firemen and Enginemen the agreement reached in mediation and covered by the National Mediation Board Docket Case No. A-905, which agreement reads as follows:

"(1) On each railroad party hereto the proportion of non-promotable firemen, and helpers on other than steam power, shall not exceed fifty per cent in each class of service established as such on each individual carrier. This agreement does not sanction on which non-promotable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2) (a) and (2) (b) men now holding seniority as firemen, or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. & E. Committee, more

favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provision.

(6) All persons hereafter hired as firemen shall be required, in addition to showing, in the opinion of the management, reasonable proficiency, to take within stated periods to be fixed by management, but in no event to extend over a period of more than three years, two examinations to be prepared by management and to be applied to all alike to test their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

Firemen hereafter hired declining to take or failing to pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall, when there is need for additional engineers, be promoted to such position, and will establish a seniority date as engineer in accordance with the rules contained in the agreements on the individual railroads.

When rules for conduct of examinations for promotion are included in urgent schedules, such rules shall apply. In the absence of such rules firemen failing to pass will be given a second trial within a period of three months and if they fail to pass on the second trial will be given a third trial within a period of three months.

Promotable firemen declining to take examinations for promotion or who fail in their efforts to successfully pass the same, shall be dropped from the service.

All promotable firemen now in the service physically qualified, who have not heretofore been called for examination or promotion, or who have not waived promotion shall be called in their turn for promotion. When so called should they decline to take such examination or promotion

or fail to pass as herein provided, they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers on other than steam power to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers.

(8) This agreement shall become effective February 22, 1941."

The committee representing the firemen requested that paragraphs 1 to 4 of the Mediation Board agreement quoted above be included as a part of this supplementary agreement as provided for in paragraph 5 of said agreement.

The definition and application of the phrases "—each class of service established as such—" contained in the first sentence of paragraph 1 as that the following constitute the classes of service to which paragraph 1 applied:

- Passenger
- Local Freight
- Through Freight
- Work, Ballast and Construction
- Yard

The provision of paragraph 2 (b) is understood and agreed to mean that not in excess of 50 percent non-promotable men will be assigned to any class of service on any seniority district.

EXAMPLE 1

In case of only one assignment, in any class of service, on any seniority district, and such assignment is filled by a non-promotable fireman, in the event of the death, dismissal, resignation or disqualification of such non-promotable firemen the assignment would then be filled by a promotable fireman.

EXAMPLE 2

In case of 4 assignments in any class of service on any seniority district filled by one promotable and 3 non-promotable firemen, in the event of the death, dismissal, resignation or disqualification of one of the non-promotable firemen, the assignment would then be filled by a promotable fireman.

It is understood and agreed that the phrase "—non-promotable fireman—" carried in paragraph 1 of the above quoted agreement refers only to colored firemen.

It is agreed that promotable firemen now in the service who are physically qualified and not otherwise restricted, who have heretofore been called for examination for promotion and failed, or who have waived promotion, will be called for examination for promotion between May 1 and May 15, 1942. In the event such firemen fail to pass examination for promotion, or waive examination, their seniority as firemen shall not be affected.

NORFOLK SOUTHERN RAILROAD COMPANY,
M. S. HAWKINS and L. H. WINDHOLZ,

Receivers,

(Signed) By J. C. POE,

Assistant to General Superintendent.

Accepted for the Firemen:

(Signed) G. M. DOBSON,

General Chairman,

*Brotherhood of Locomotive Firemen
and Enginemen.*

Raleigh, N. C. May 23, 1941.

Office Supreme Court, U. S.

WILSON

MAY 3 1944

CHARLES L. MORE DROPLEY
OCEAN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 37

TOM TUNSTALL,

Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, OCEAN LODGE NO. 76, PORT NOR-
FOLK LODGE NO. 775, W. M. MUNDEN AND NOR-
FOLK SOUTHERN RAILWAY COMPANY.

REPLY BRIEF OF PETITIONER.

CHARLES H. HOUSTON,

Counsel for Petitioner.

JOSEPH C. WADDY,

OLIVER W. HILL,

Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 779

TOM TUNSTALL,

Petitioner,

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, OCEAN LODGE NO. 76, PORT NOR-
FOLK LODGE NO. 775, W. M. MUNDEN AND NOR-
FOLK SOUTHERN RAILWAY COMPANY.

REPLY BRIEF OF PETITIONER.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

There was no lack of necessary defendants in this case.
All necessary parties were present before the Court.

All the respondents: Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, W. M. Munden and Norfolk Southern Railway Company oppose the petition for a writ of certiorari on the ground the Brotherhood is a necessary party defendant, has not been served with process, and is not before the Court. (See Brotherhood brief pp. 3-9; Railway brief pp.

1-2). Ocean Lodge also objects to the service of process (Brotherhood brief p. 7, R. 32).

The contentions of the respondents were denied by the United States District Court (R. 50), and ignored by the United States Circuit Court of Appeals in its opinion (R. 55) although the points were specifically raised in each court by respondents (R. 25-33; Brotherhood brief pp. 4-5; Railway brief, p. 2).

The facts on this matter are as follows: petitioner proceeded against the respondent Brotherhood of Locomotive Firemen and Enginemen not only directly in proper person (R. 2) but also under Rule 23 (a) of the Federal Rules of Civil Procedure (Appdx.) through its subordinate lodges: Ocean Lodge No. 76 and Port Norfolk Lodge No. 775, and its local representative, W. M. Munden, Local Chairman of Ocean Lodge No. 76 (R. 2-3, 24).

Process was served on Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and on the individual respondent Munden. No service was made on the Brotherhood as such (R. 53). The service of process on Ocean Lodge No. 76 was challenged (R. 32, 53-54). Service on Port Norfolk Lodge No. 775 and on respondent Munden was *not* challenged (R. 30-31). Therefore, the Brotherhood is before the Court under Federal Rules of Civil Procedure, Rule 23 (a) by service on at least two representatives.

The complaint specifically charged that petitioner was employed as a locomotive fireman on the Northern Seniority District of the Railway (par. 6, R. 4) and that his wrongful displacement occurred in said Seniority District (par. 6, R. 4; par. 10, R. 10). As to the respondents it charged:

"3. The defendant, Brotherhood of Locomotive Firemen and Enginemen (hereinafter called the Brotherhood) is an international unincorporated association whose membership is derived principally from white firemen and enginemén employed on interstate rail-

roads, including the Norfolk Southern Railroad and its successor in interest, the Norfolk Southern Railway; is the Representative under the Railway Labor Act, 1934, 48 Stat. 1185, U. S. C. Title 45, Chapter 8, of the craft or class of locomotive firemen employed on said Railroad and is sued as such. It is composed of a Grand Lodge and over nine hundred subordinate lodges, including the defendant subordinate lodges, which are too numerous to make it practicable to bring them all before the Court. The subordinate lodges are also unincorporated associations, each composed of numerous individual locomotive firemen, and it is likewise impracticable to bring them all before the Court. The Brotherhood has a national treasury derived from membership dues and otherwise. By constitutional provision, ritual and practice it restricts its membership to white locomotive firemen and enginemen. Plaintiff is excluded therefrom solely because of race."

"4. The defendants, Ocean Lodge, No. 76 and Port Norfolk Lodge, No. 775, are subordinate lodges of the defendant Brotherhood having their locations in Norfolk, Virginia, and Portsmouth, Virginia, respectively, within the jurisdiction of this Court. The business of each subordinate lodge is managed by a President, Recording Secretary, Legislative Representative, Local Organizer and Local Chairman. The members of the defendant subordinate lodges are either employed by the Norfolk Southern Railroad Company, and directly involved in the matters herein complained of, or are members of the defendant Brotherhood resident within the jurisdiction of this court. Upon information and belief plaintiff alleges that the defendant subordinate lodges constitute all of the lodges of the defendant Brotherhood within the territorial limits of the Norfolk Division of the United States District Court for the Eastern District of Virginia, and are truly and fairly representative of the remaining lodges of the Brotherhood and of the Brotherhood itself, and the interest of all the members, subordinate lodges and the Brotherhood will be adequately represented in the premises by

the defendants of record. The defendant subordinate lodges are sued as representatives of the membership, all the subordinate lodges and the Brotherhood itself."

"5. The defendant, W. M. Munden, is a white locomotive fireman employed by the Norfolk Southern Railroad and its successor in interest, the Norfolk Southern Railway; is a member of the defendant Brotherhood who, because of the wrongs inflicted by the Brotherhood upon plaintiff and his class, gained certain advantages and considerations which rightfully belong to plaintiff as hereinafter will appear more fully. He is local Chairman of defendant Ocean Lodge, No. 76, and acts for the Brotherhood in enforcing the schedule of rules and working conditions and in matters of grievance adjustments and job assignments on the Northern Seniority District of said Railroad. He is sued in his own right and as a representative of the members of the Brotherhood, particularly those employed on the Norfolk Southern Railroad and its successor in interest, the Norfolk Southern Railway Company" (R. 2-3).

Demonstrating that the action involves common questions of law and fact affecting the several rights and that a common relief is sought (Rule 23 (a-3)), petitioner charged in Count I that the wrongs complained of were inflicted upon him by the Brotherhood itself (R. 4), and reasserted the same fact with more elaboration in Count II (R. 6-12). The Brotherhood as an unincorporated association is the totality of its membership; hence the questions of law and fact affecting its action as against a nonmember must be common to all the members of the association.

Petitioner also brought a class suit on behalf of all the Negro firemen employed by the respondent Railway. He charged in Count II that

"1. * * * Said Negro firemen constitute a class too large to be brought individually before the Court, but

there are common questions of law and fact involved herein, common grievances arising out of common wrongs, and common relief for the entire class is sought as well as special relief of this plaintiff; and the interests of said class are fairly and adequately represented by plaintiff" (R. 5).

As part of the relief prayed, petitioner sought a declaratory judgment declaring the respective rights and duties of the Brotherhood as representative under the Railway Labor Act of the craft or class of locomotive firemen employed by the respondent Railway in respect to the members of said craft or class, including plaintiff and other minority firemen, nonmembers of the Brotherhood; a permanent injunction against the Brotherhood, its officers, agents or subordinate lodges, their officers and agents, restraining and enjoining them from purporting to act as the representative of plaintiff and the other Negro firemen under the Railway Labor Act so long as it or they, or any of them, refuse to represent him and them fairly and impartially; and so long as it or they continue to use its position to destroy the rights of plaintiff and the class he represents herein (R. 12-13).

The District Court held that "The Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and William M. Munden and the Norfolk Southern Railway Company have been duly served and are properly before the Court" (R. 50). It thereupon overruled the motions of the Brotherhood and of Ocean Lodge No. 76 to dismiss on the ground of no service of process (R. 50).

It thus appears that the requirements of Federal Rules of Civil Procedure, Rule 23 (a), have been expressly complied

with; that the instant case is typical of the cases brought under said subsection;

See Federal Rules of Civil Procedure and Proceedings of the American Bar Institute, Cleveland, 1938, pp. 50, 263-264;

and that the objections of the respondents to the service of process and the jurisdiction of the Court over the Brotherhood of Locomotive Firemen and Enginemen are frivolous.

CHARLES H. HOUSTON,
Attorney for Petitioner.

JOSEPH C. WADDY,

OLIVER W. HILL,

Of Counsel.

APPENDIX.

FEDERAL RULES OF CIVIL PROCEDURE.

RULE 23. CLASS ACTIONS.

(a) **REPRESENTATION.** If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several; and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

APR 15 1944

Supreme Court of the United States

OCTOBER TERM, 1943

No. 779

TOM TUNSTALL

BROTHERHOOD OF LOCOMOTIVE
FIREMEN AND ENGINEMEN,
and OTHERS

BRIEF FOR NORFOLK SOUTHERN RAILWAY
COMPANY OPPOSING GRANTING
CERTIORARI

JAS. G. MARTIN,

500 Western Union Building, Norfolk, Va.

Counsel

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Supreme Court of the United States

OCTOBER TERM, 1943

No. 779

TOM TUNSTALL

v.

BROTHERHOOD OF LOCOMOTIVE
FIREMEN AND ENGINEMEN,
and OTHERS:

BRIEF FOR NORFOLK SOUTHERN RAILWAY COMPANY OPPOSING GRANTING CERTIORARI

1. At the outset we submit that the Court should not take jurisdiction because the notice of filing of petition with printed copies of petition, brief, and record were not served within ten days from March 10, 1944, the date the petition was filed; but on the contrary not until March 21, 1944; as required by Rule 38 of this Court, Subsection 3.

2. Furthermore, we submit that there is no jurisdiction because an absolutely necessary party, to-wit, Brotherhood of Locomotive Firemen and Enginemen, never was brought before the District Court nor the Circuit Court of Appeals by service of any process

nor by any appearance and this objection was made from the very beginning in the District Court. See Record page 34.

That there was no service upon said Brotherhood is positively shown by the return of the Marshal, record page 53, reading "Returned not executed as to Brotherhood of Locomotive Firemen and Enginemen, no representative in this District."

Both the District Court and the Circuit Court of Appeals having decided in favor of defendants on the ground that no federal question was involved, in their opinions have totally ignored the matter of said Brotherhood, a necessary party, not being before the Court; although the final order of the District Court (Record page 50) stated that said Brotherhood had been duly served in the face of the Marshal's return to the very contrary. The petition for certiorari and the brief in support thereof also totally ignore the question of said Brotherhood being served with process.

To have the necessary parties before the Court being a condition precedent to jurisdiction on other questions, we submit, that the want of that party before the Court prohibits jurisdiction and makes refusal of the certiorari necessary.

3. If it can be imagined that this case is before this Court in time, and that the necessary parties are before the Court, still this Court has no jurisdiction and the certiorari should be refused because there is no federal question before the Court.

That there is no federal question is so thoroughly shown by the opinion of the District Court (record

page 36), and by the opinion of the Circuit Court of Appeals (record page 55), that we think it would make "vain repetitions" (Matthew VI, 7) for us to quote from the many cases emphatically establishing that no federal question is involved. We call especial attention to the cases cited by the Circuit Court of Appeals (record pages 56, 57).

We respectfully submit that certiorari should be refused.

JAS. G. MARTIN,

500 Western Union Building, Norfolk, Va.

*Attorney for Norfolk Southern
Railway Company.*

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APR 24 1944

CHARLES ELMORE GROTELEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943

No. [REDACTED] 37

TOM TUNSTAHL

Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775, W. M. MUNDEN AND NORFOLK SOUTHERN RAILWAY COMPANY

BRIEF FOR RESPONDENTS BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775 and W. M. MUNDEN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

HAROLD C. HEISS and

RUSSELL B. DAY,

714 Keith Building, Cleveland, Ohio

WM. G. MAUPIN,

415 Bank of Commerce Building, Norfolk, Va.

Counsel for Respondents.

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Supreme Court of the United States

OCTOBER TERM, 1943

No. 779

BRIEF FOR RESPONDENTS BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775 and W. M. MUNDEN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT

Petitioner, a negro fireman employed by the Norfolk Southern Railway Company, brought this action in the District Court of the United States for the Eastern District of Virginia on behalf of himself and other negro firemen employed by that Railroad against the Railway Company, the Brotherhood of Locomotive

Firemen and Enginemen; two subordinate lodges of that Railway Labor Union, and an officer of one of the local lodges.

The gravamen of the complaint is that the plaintiff as a fireman employed by the respondent railway company had acquired certain contractual rights in the nature of seniority rights; that the Brotherhood as the bargaining agent of the whole craft of firemen had negotiated a certain agreement with the railway which modified the seniority rights in a manner that discriminated against plaintiff; and that thereby plaintiff suffered detriment with respect to seniority rights, sometimes referred to as assignments. The complaint asks for a declaratory judgment that the Union, as bargaining representative, is bound to represent fairly and impartially all members of the craft; an injunction restraining the defendants from enforcing or operating under the agreement complained of insofar as it discriminates against negro firemen, and restraining the Union from acting as the bargaining representative of the negro firemen so long as it refuses to represent them fairly and impartially; an award against the Union for damages; and an order restoring plaintiff to the assignment to which he claims he is entitled and of which he claims he was deprived.

The complaint contains no allegation of diversity of citizenship. It asserts jurisdiction under 48 Stat. 1185; U. S. C. Title 45, Chapter 8; U. S. C. Title 28, Section 41 (8); U. S. C. Title 28, Section 400; and the Federal Rules of Civil Procedure. Federal jurisdiction depends on whether the controversy is one arising under the laws of the United States.

The District Court decided that no federal question was presented and no jurisdiction inhered in that court to hear and decide the case. Accordingly, on May 7, 1943, it granted motions to dismiss filed by respondents, and entered judgment for the defendants and against the plaintiff.

From this judgment plaintiff appealed to the Circuit Court of Appeals for the Fourth Circuit, which, by its opinion entered January 10, 1944 (140 F. (2d) 35) affirmed the order of the District Court. To that judgment of affirmance the writ of certiorari is sought; and in the petition the Railway Labor Act is relied on as affording federal jurisdiction.

QUESTIONS PRESENTED

1. Can any court take jurisdiction of a controversy and proceed to adjudicate it when the record shows affirmatively that a necessary defendant has not been served with process and is not before the court?
2. Does a complaint which alleges that a bargaining agent, chosen pursuant to the provisions of the Railway Act, has negotiated a contract that discriminates against the rights of certain members of the craft established by prior collective bargaining agreements between the representative and the carrier, present a federal question?

SUMMARY OF ARGUMENT

1. Respondent, Brotherhood of Locomotive Firemen and Enginemen, was never served with process in this case. It made timely motion to dismiss the case as to it, appearing specially for that purpose; and there is no jurisdiction of the person as concerns that respondent. The same is true as to respondent Ocean Lodge No. 76.

2. Jurisdiction of the subject matter is lacking since no federal question is presented, because:
- The complaint seeks to inject a federal question by attempting to anticipate a probable defense;
 - The rights claimed by petitioner are plainly non-existent.

ARGUMENT

- I -

RESPONDENT, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, WAS NEVER SERVED WITH PROCESS IN THIS CASE. IT MADE TIMELY MOTION TO DISMISS THE CASE AS TO IT, APPEARING SPECIALLY FOR THAT PURPOSE: AND THERE IS NO JURISDICTION OF THE PERSON AS CONCERNS THAT RESPONDENT. THE SAME IS TRUE AS TO RESPONDENT, OCEAN LODGE No. 76.

The return of the Marshal of service of the summons and complaint as to respondent Brotherhood of Locomotive Firemen and Enginemen is this: "Returned not executed as to the Brotherhood of Locomotive Firemen and Enginemen, no representative in this district." (R. 53)

By timely motion under Rule 12(b) of the Rules of Civil Procedure, the respondent Brotherhood of Locomotive Firemen and Enginemen, appearing specially, moved to dismiss the action on the ground that there had been no service of process on it; that it is a voluntary unincorporated association (cf. complaint, R. 2), and that no officer or trustee had been served with process; and that the court lacked jurisdiction of its person because there had been no service of process and this respondent was not before the court. (R. 25)

Notwithstanding the return showing that no service on the respondent Brotherhood had ever been made, the District Court held that it had been duly served and was properly before the court; and it overruled its motion to dismiss on the ground that no service of process had been had (R. 50). In the same judgment the District Court dismissed the complaint on the ground of lack of jurisdiction of the subject matter.

The action of the District Court in refusing to dismiss the complaint as to the respondent Brotherhood for lack of jurisdiction of its person was made the subject of complaint in the brief filed by that respondent with the Fourth Circuit. The point was not noticed in the opinion of the Circuit Court of Appeals for the Fourth Circuit.

It seems superfluous to argue that the Brotherhood, as to which the Marshal's return shows no service of process, is not before the court unless service on its subordinate lodges be held to be service upon it.

Rule 17(b) of the Rules of Civil Procedure provides that capacity to sue or be sued shall be determined by the law of the state in which the District Court is held.

Section 6058 of the Code of Virginia of 1936 reads as follows:

"All unincorporated associations or orders may sue and be sued under the name by which they are commonly known and called, or under which they do business, and judgments and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated. Process against such association or order may be served

on any officer or trustee of such association or order."

Rule 4-(d)-(3) of the Rules of Civil Procedure provides that service shall be made upon an "unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process * * * *"

This record shows no service on any officer, trustee, managing or general agent or any other agent authorized by appointment to receive service of process. No agent is authorized by law to receive such service (Code of Virginia, §6058, supra). Service upon an officer of a subordinate lodge is insufficient and constitutes no service at all against the association. *International Brotherhood of Boilermakers v. Wood*, 162 Va. 517.

It further affirmatively appears from the record that respondent Ocean Lodge No. 76 has never been served with process and is not before the Court. The return of the Marshal as to this respondent is as follows:

"Not finding any representative of the within named Lodge (Ocean Lodge No. 76) I served a copy of the Summons together with a copy of the Complaint, by delivering same to Lucile Munden, she being the wife of W. M. Munden; and above the age of sixteen years and a member of his family at his regular place of abode at 1123 Hawthorne Avenue, South Norfolk, Va. for delivery to the within named W. M. Munden at his regular place of abode, a place within my District.

"R. L. Ailworth, United States Marshal,
by H. L. Trimyer, Deputy U. S. Marshal."
(R 54)

By timely motion respondent Ocean Lodge No. 76 appeared specially and moved to dismiss the action so far as concerned it, and to quash the purported service of summons on the ground that no proper service had been made on said Ocean Lodge No. 76, and the Court lacked jurisdiction over the person of that defendant. (R. 32) The District Court in its final judgment held that Ocean Lodge No. 76 had been duly served and was properly before the Court (R. 50). Complaint upon this ruling was made in the brief filed by this respondent with the Court of Appeals for the Fourth Circuit. The point was not noticed in its opinion.

The Marshal's return does not state whether W. M. Mundén or Lucile Mundén are in any way connected with, officers or trustees or agents of said Ocean Lodge No. 76. Even if it be assumed that W. M. Mundén is an officer of said Ocean Lodge No. 76, service upon his wife is no service upon the Lodge. *Section 6041, Virginia Code of 1936* provides, so far as pertinent here, as follows:

"A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person, or if he or she be not found at his or her usual place of abode, by delivering such copy and giving information of its purport to any person found there, who is a member of his or her family (not a temporary sojourner, or guest), and above the age of sixteen years; or if neither he nor she, nor any such person be found there,

by leaving such copy posted at the front door of said place of abode."

Section 6062 of the *Code of Virginia* of 1936 provides, so far as pertinent here, as follows:

"Any summons or seire facias may be served in the same manner and by the same person as is prescribed for the service of a notice under Section Six Thousand and Forty-one, except that when such process is against a corporation the mode of service shall be as prescribed by the two following Sections".

The two "following sections" just above referred to are Sections 6063 providing for service of process on domestic corporations, and 6064 providing for service on foreign corporations. Neither provides for service on unincorporated associations which is covered only by Section 6058 hereinabove quoted. An unincorporated association in Virginia can be sued and served only by virtue of that section. *International Brotherhood of Boilermakers v. Wood*, *supra*. In Virginia, service against a domestic corporation can not be made by serving the wife of an officer, director or agent of a corporation. *Waterfront Coal Co. v. Smithfield Transportation Co.*, 114 Va. 482; *Burks Pleading & Practice* (3d Ed.) 74.

It is clear that Ocean Lodge No. 76 has never been served with process; and, by reason of its special appearance and its motion to quash the service and dismiss the action, it is not before the Court.

The basis of petitioner's complaint arises out of a contract which, petitioner claims, invades his rights.

Only one of the contracting parties—the Railroad—is before the Court.

This point can properly be brought to the attention of the Court without the assignment of cross error or the entry of a cross appeal. The general principle is stated in *Moore's Federal Practice*, §3, 3394; 3577: "But the appellee may, even though he has not entered a cross appeal, defend a judgment on any ground consistent with the record, even if rejected below."

Supporting this principle are the following cases: *Langues v. Green*, 282 U. S. 531, 535; *Commissioner v. Havemeyer*, 296, U. S. 506, 509; *United States v. Curtiss-Wright Co.*, 299 U. S. 304, 330; *Morley Co. v. Maryland Cas. Co.*, 300 U. S. 185, 191.

Since this point is jurisdictional and goes to the right of any court, trial or appellate, to take cognizance of this action as regards respondents Brotherhood of Locomotive Firemen and Enginemen and Ocean Lodge No. 76, it may be raised at any time or in any manner, and, indeed, could be considered by the court *ex mero motu*.

— II —

JURISDICTION OF THE SUBJECT MATTER IS LACKING SINCE NO FEDERAL QUESTION IS PRESENTED.

— A —

The complaint seeks to inject a federal question by attempting to anticipate a probable defense.

The rights which plaintiff seeks to protect are contract rights. The plaintiff complains that these rights were violated by the Brotherhood when it, acting

in the capacity of statutory representative, negotiated an agreement with the railway which violated these contract rights. It is charged that the Brotherhood, in negotiating the new agreement, acted unfairly toward plaintiff and discriminated against him, instead of representing him fairly as it is claimed it ought to do when acting as a statutory representative. The obligation of the contract is a creation not federal, but of the state; and a wrongful breach thereof does not confer federal jurisdiction. *Gully v. First National Bank*, 299 U. S. 109. See also *Teague v. Brotherhood of Locomotive Firemen & Enginemen*, C. C. A. Sixth, 127 F. 2d, 53; *Barnhart v. Western Maryland Ry. Co.*, C. C. A. Fourth, 128 F. 2d, 709; *Burke v. Union Pacific Ry. Co.*, C. C. A. Tenth, 129 Fed. 2d, 844.

In the effort to escape from the effect of the doctrine announced in the *Gully* case, the complaint contains much matter referring to the Railway Labor Act as the origin of the alleged status of the respondent Brotherhood as bargaining agent. So far as the complaint is concerned, these allegations add nothing to it. If, as alleged, the Brotherhood, as bargaining agent, entered into a discriminatory contract to the detriment of the plaintiff and wrongfully deprived him of certain rights, it is immaterial how it became such bargaining agent. These allegations are a patent effort to anticipate a possible defense. Such allegations do not present a federal question, which must be shown by the plaintiff's own statement of his cause of action exclusive of allegations anticipating a defense which may present a federal question. *Gold Washing & Water Co. v. Keys*, 96 U. S. 199; *Chicago, Rock Island Pac. Ry. Co. v. Martin*,

178 U. S. 245; *Louisville & Nashville R. R. Co. v. Mottley*, 211 U. S. 149; *Tennessee v. Union & Planters Bank*, 152 U. S. 454.

The rights which petitioner claims he had and further claims were infringed, be they called seniority rights or assignments, arise solely out of the contractual relationship with the employer. *Hartley v. Brotherhood of Railway & Steamship Clerks*, 283 Mich. 201; *Order of Railway Conductors v. Shag*, 189 Okla. 665; *Ryan v. The New York Central R. Co.*, 267 Mich. 202; *Norfolk & Western R. Co. v. J. Harris*, 260 Ky. 132.

Therefore, the complaint is that petitioner's contract rights have been violated and the relief sought is based upon such alleged violation. Succinctly, the complaint is breach of contract; and the remedy for such a wrong is a common law remedy to be pursued, if at all, as a matter of local law in the state courts.

The brief of petitioner (p. 14, p. 17) asserts that the decisions below violate the Fifth Amendment of the Constitution of the United States. Again, this is an attempt to set up a federal question by anticipating a possible defense. A suggestion by a plaintiff that defendant will or may set up a claim under the Constitution of the United States does not make the suit one arising under the Constitution. *Tennessee v. Union & Planters Bank*, 152 U. S. 454. A fortiori a suit does not arise under the Constitution of the United States by including in the complaint an anticipated reply to an anticipated defense.

—B—

The rights claimed by petitioner are plainly non-existent.

No federal question is presented by a complaint which sets up an alleged federal question plainly unsubstantial, either because it is obviously without merit or because it has been so definitely resolved and settled by previous decisions of this Court that no room is left for reasonable doubt or controversy thereupon. *Levering & Garrigues Co. v. Morris*, 289 U. S. 103.

The brief of petitioner admits that the Railway Labor Act is silent respecting any provision with regard to the character of the representation of a craft by the duly selected bargaining agent. (Br. p. 9) Whether it be conceded or not, it is a fact, as inspection of the Act will disclose, The District Court so held in its opinion. (R. 46) The Circuit Court of Appeals for the Fourth Circuit stated that fair representation for the purposes of collective bargaining was "implicit" in the provisions of the Railway Labor Act—which is to say that all persons who act as agents or in any other contractual capacity are held to the duty to act fairly and honestly whether specifically directed so to do or not. But the Circuit Court of Appeals for the Fourth Circuit found no provision of the Act which protects or even refers to the rights of the petitioner which, the complaint avers, have been violated. The Circuit Court of Appeals for the Sixth Circuit, in *League v. Brotherhood of Locomotive Firemen and Enginemen*, 127 F. (2d) 53, found specifically that the act contained no such provision.

It follows that the petitioner is not seeking judicial construction of the Act, but invoking judicial legislation to the effect that provisions not made by Congress may be inserted therein by the courts. This Court has repeatedly refused to assume any such function: *Ebert v. Poston*, 266 U.S. 548; *United States v. Missouri Pacific R.R. Co.*, 278 U.S. 269.

The identical case here presented has been decided to the same effect by two Circuit Courts of Appeals: By the Sixth Circuit in 1942 in the case of *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, supra, which is indistinguishable from this case; and by the Fourth Circuit here.

It is beyond dispute that the Railway Labor Act contains no provision conferring jurisdiction on the Federal courts to afford the relief which is here sought. That relief is accurately and succinctly summed up in the opinion of the Fourth Circuit in these words (R. 59):

"The court here is asked * * * * to declare the duty of a representative admittedly chosen by a majority of the craft, and to interfere by injunction with the process of bargaining undertaken pursuant to the Act on the ground that the purposes of the Act are being violated."

This Court has very recently rendered a line of decisions which seem to be conclusive against federal jurisdiction in this case. They are: *Brotherhood of Ry. & Steamship Clerks, etc. v. United Transport Service Employees of America* (Dec. 6, 1943) 64 S. Ct. 260; *Switchmen's Union of North America, etc. v. National Mediation Board, et al* (Nov. 22, 1943),

U. S., 64 S. Ct. 95; *General Committee, etc.*
v. *Southern Pacific Co.* (Nov. 22, 1943), U. S.
....., 64 S. Ct. 142; *General Committee, etc. v. Missouri-Kansas-Texas R. R. Co., et al.* (Nov. 22, 1943),
U. S., 64 S. Ct. 146.

All of these cases are cited in the opinion of the Circuit Court of Appeals for the Fourth Circuit. (R. 56 et seq.). They hold that relief cannot be afforded in the federal courts under the Railway Labor Act unless the command of the Act be explicit and the purpose to afford a judicial remedy plain. Absent express provisions conferring jurisdiction upon the courts, no jurisdiction exists.

This Court held in *General Committee, etc. v. Southern Pacific Co.*, *supra*, that there is no jurisdiction in the federal courts to decide which of two conflicting groups, both claiming to be bargaining agent for a craft, was the proper representative under the Act. The effect of this decision is that jurisdiction is denied the federal courts to decide whether a group, claiming to be the selected bargaining agent for a craft, is authorized to represent that craft at all. This being true, it is bound to follow that jurisdiction is lacking in the federal courts to decide whether a group, alleged to be a bargaining agent, has or has not properly and impartially dealt with sundry of the members of the craft which it represents.

In *General Committee, etc. v. Missouri-Kansas-Texas R. R. Co.*, *supra*, this Court dwelt upon the purpose of Congress to utilize the machinery of conciliation, arbitration and mediation to the greatest extent possible, and its hesitancy to commit delicate problems

highly charged with emotion to the decision of the courts. It stated that "The conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else is left to those voluntary processes whose use Congress had long encouraged to protect these arteries of Interstate Commerce from industrial strife."

It would seem manifest that the vesting of jurisdiction in the federal courts to decide such a case as is here presented would nullify the whole rationale of the opinion in the *Missouri-Kansas-Texas* case. Every agreement made by a bargaining agent with a railroad would be the subject of judicial scrutiny at the behest of any disgruntled member of the craft who might allege that the contract made by that bargaining agent on behalf of the craft with the railroad operated to his disadvantage. All stability of status between the railroad and its employees would be lost. The very purpose of the Act, peaceable settlement of labor controversies and the avoidance of interference by the courts, would be set at naught.

Every railroad must treat with the bargaining agent selected and with no other. *Virginian R. Co. v. System Federation*, 300 U. S. 515. In that case this Court said:

"More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an inter-

state rail carrier to perform its service to the public, is a matter of public concern."

Contracts so made, pursuant to the Railway-Labor Act and in obedience to the mandate of this Court, ought not to be subject to revision by the courts upon the demand of a member of the craft who considers himself aggrieved by the terms thereof. It clearly was not the intention of the Congress to provide that contracts should be made by railroads with a designated agency selected by the employees and then permit such contracts to be abrogated, amended, or enlarged by the courts. That way chaos lies. Were such demands to be judicially entertained and decided, other individuals or groups within the craft might well claim that the decision adversely affected them and ask for further modification of the contract collectively made by the bargaining agent with the railroad. Stable contractual status would be non-existent; far from being promoted, industrial peace would be rendered well nigh impossible.

It seems evident that this Court had cognate considerations in mind when it rendered the recent decisions exemplified by the *Missouri-Kansas-Texas* case.

CONCLUSION

Upon the record here presented these respondents say:

1. That the respondent Brotherhood of Locomotive Firemen and Enginemen is a necessary party to this litigation, has never been served with process, is not before the court, and that no order or decision

can properly be made by any court in this case which affects it; and Ocean Lodge No. 76 has never been served with process and is not before the Court.

2. That the federal courts lack jurisdiction of the subject matter of this suit.

3. That the writ of certiorari prayed for in the petition should accordingly be denied.

Respectfully submitted,

HAROLD C. HEISS and

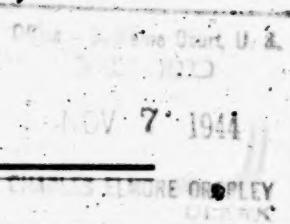
RUSSELL B. DAY,

1814 Keith Building, Cleveland, Ohio.

WM. G. MAPPIN,

415 Bank of Commerce Building, Norfolk, Va.

*Counsel for Respondents, Brotherhood of
Locomotive Firemen and Enginemen,
Ocean Lodge No. 76, Port Norfolk Lodge
No. 775 and W. M. Mundon.*



IN THE
Supreme Court of the United States
OCTOBER TERM, 1944

No. 37

TOM TUNSTALL,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE No. 76, PORT NORFOLK LODGE No. 775,
W. M. MUNDEN and NORFOLK SOUTHERN RAILWAY COMPANY.

BRIEF FOR NORFOLK SOUTHERN RAILWAY COMPANY

JAS. G. MARTIN,
500 West Union Building, Norfolk, Va.
*Counsel for Norfolk Southern
Railway Company.*

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BRIEF FOR NORFOLK SOUTHERN RAILWAY COMPANY

No brief has been filed on behalf of Tom Tunstall, petitioner, and the time for filing the same has apparently passed, so we work upon this present brief without a brief on behalf of Tunstall before us and in the face of Section 7 of Rule 27, of this Court, which says that in default of the brief being filed by the petitioner, the Court may dismiss the cause, and we submit that this cause should be dismissed pursuant to that Rule.

However, not knowing what ruling the Court will make as to default in filing a brief for petitioner, we proceed to consider the case.

We submit that there is no jurisdiction in the Court for two reasons, namely:

1. Brotherhood of Locomotive Firemen and Enginemen, a necessary party, has never been brought before the Court.
2. There is no Federal question involved in the case.

Discussing these matters separately, we submit:

1. That the Brotherhood of Locomotive Firemen and Enginemen was not brought before the Court is shown by the fact that it never voluntarily appeared, and that the return of the Marshal expressly shows that it was not served with process, that return reading (Record 40):

"Returned not executed as to the Brotherhood of Locomotive Firemen and Enginemen, no representative in this District."

Proper objections were duly made on this score (R. 21, 27).

Rule 17(b) of the Rules of Civil Procedure provides that the capacity to sue or be sued shall be determined by the law of the State in which the District Court is held (with certain exceptions, not relevant here); and the law of Virginia is especially contained in Section 6058, Code of Virginia, 1919, Section 6058

of Michie's Code of Virginia, of 1942, which was in full force during the whole course of this case, and which reads:

"§6058. Suits by and against unincorporated associations or orders.—All unincorporated associations or orders may sue and be sued under the name by which they are commonly known and called, or under which they do business, and judgment and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated. Process against such association or order may be served on any officer or trustee of such association or order."

Service can be made only as authorized by that statute, and service upon mere agent, or upon an officer of a subordinate lodge or order is not sufficient. *International Brotherhood of Boiler Makers v. Wood*, 162 Va. 517, 527, 528.

To meet this situation, Tunstall relies upon Rule 23 of Rules of Civil Procedure, which reads:

Rule 23. Class Actions.

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action;

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

We submit that this rule does not apply at all. This Brotherhood was subject to suit as a single unit under the Virginia Statute just quoted, Virginia Code §6058.

2. There is no Federal question involved in the case.

Unstall claims that his rights of seniority under contract with Norfolk Southern Railway Company have been violated.

No Federal question is made by that claim. His additional averments that the Brotherhood has not properly represented him and the whole craft in bargaining makes no Federal question.

As said, in the opinion of the District Court in the instant case (R. 36):

"As already noted, the Railway Labor Act of 1934 provides for the members of a craft or class of an interstate railway to select a bargaining agent to

represent that craft or class for the purpose of collective bargaining, and requires the Railway to recognize and treat with the agent so selected, *Virginian Railway Company v. System Federation*, No. 40, etc., 300 U. S. 515, affirming *Fourth Cir.*, 84 Fed. 2d, 641, and the Railway can treat only with the agent selected by the craft or class, *Atlantic Coast Line R. Co. v. Pope*, *Fourth Cir.*, 119 Fed. 2d, 39. However, we search the Railway Labor Act in vain for any provision affording protection to the minority against wrongful, arbitrary or oppressive action of the majority through the bargaining agent which the majority has selected. The Act is silent in that respect. It stops short after providing for the selection of the bargaining agent and imposing upon the Railway the duty to treat with that agent alone after he is selected. Numerous authorities were cited and quoted in the arguments, among them *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, 6th Cir. (1942), 127 Fed. 2d, 53. After a study of that decision, the Court has concluded that it is directly in point in the instant case, and in *Barnhart v. Western Maryland Ry Co.*, 4th Cir., 128 Fed. 2d, 709, 714, our Circuit Court of Appeals, after discussing and reviewing the authorities generally as to when a Federal question is presented, referred to and quoted the Teague case, as follows:

"Quite in point here is the very recent case of *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, 6 Cir. 127 F. 2d, 53, decided April 9, 1942. That was an action by a railway fireman against the Brotherhood (which was designated as collective bargaining agent of his class under the

Railway Labor Act) and the Railroad, to set aside a collective bargaining agreement on the ground that this agreement was destructive of his vested rights of seniority preference. In the unanimous opinion of the Court, holding that the action did not arise under a federal law, Circuit Judge Simons, 127 F. 2d, 53, 56, said:

"Reverting to the appellant's own statement of his case, such rights as are here claimed arise from individual contracts of the Negro firemen with the defendant Railroad. The appellant is unable to point to provision of the Railway Labor Act which protects such rights, or permits their invasion. The provisions of Sec. 2, subd. eighth makes the terms of the collective-bargaining agreement a part of the contract of employment between the carrier and each employee—the case, nevertheless, remains one based upon a contract between private parties cognizable, if at all, under state law!"

"It is apparent in the light of these authorities that no Federal question is presented in the present case, and there being a lack of diversity of citizenship between the plaintiff and defendants, it follows that the motion to dismiss will have to be sustained."

And in affirming the District Court, the Circuit Court of Appeals for the Fourth Circuit collected many cases, and expressed the situation quite clearly, as follows (R. 43):

"There is no allegation of diversity of citizenship and jurisdiction of the suit can be maintained only

on the ground that the controversy is one arising under the laws of the United States. In so far as the suit is grounded on wrongful acts of the defendants, it cannot be said to be one arising under the laws of the United States, even though the union was chosen as bargaining representative pursuant to such laws. *Barnhart v. Western Maryland Ry. Co.*, 4 Cir., 128 F. 2d 709; *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, 6 Cir., 127 F. 2d 53. We have considered whether jurisdiction might not be sustained for the purpose of declaring the rights of plaintiff to the fair representation for the purposes of collective bargaining which is implicit in the provisions of the National Railway Labor Act. We think, however, that recent decisions of the Supreme Court hold conclusively that there is no jurisdiction in the federal courts to afford relief under the act except where express provisions of the act so indicate. *Brotherhood of Ry. & S. S. Clerks, etc. v. United Transport Service Employees of America* (decided Dec. 6, 1943), U. S.; *Switchmen's Union of North America, etc. v. National Mediation Board, et al.* (decided Nov. 22, 1943) U. S., 64 S. Ct. 95; *General Committee, etc. v. Southern Pac. Co.* (decided Nov. 22, 1943), U. S., 64 S. Ct. 142; *General Committee, etc. v. Missouri-Kansas-Texas Railroad Co., et al.* (decided Nov. 22, 1943), U. S., 64 S. Ct. 146. In the case last cited, the Supreme Court, after commenting upon various provisions of the act and the machinery provided for their enforcement, said:

* * * "The new administrative machinery plus the statutory commands and prohibitions marked a great

advance in supplementing negotiation and self-help with specific legal sanctions in enforcement of the Congressional policy.

"But it is apparent on the face of the Act that while Congress dealt with this subject comprehensively, it left the solution of only some of those problems to the courts or to administrative agencies. It entrusted large segments of this field to the voluntary processes of conciliation, mediation, and arbitration. Thus by Sec. 5, First Congress provided that either party to a dispute might invoke the services of the Mediation Board, in a 'dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference' and any other 'dispute not referable to the Adjustment Board and not adjusted in conference between the parties or where conferences are refused.' Beyond the mediation machinery furnished by the Board lies arbitration. Sec. 5, First and Third, Sec. 7. In case both fail there is the Emergency Board which may be established by the President under Sec. 10. In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems

has made it hesitant to go too fast or too far. *The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.*" (Italics supplied)

That the Fifth Amendment to the Constitution of the United States relates to Government action only, and not to action by private persons, and has nothing to do with the instant case, seems too clear to call for argument or citation of authority.

We respectfully submit that the case should be dismissed.

JAS. G. MARTIN,

500 Western Union Building, Norfolk, Va

Counsel for Norfolk Southern
Railway Company.

In the Supreme Court of the United States
OCTOBER TERM, 1944.

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LODGE NO. 76, PORT NORFOLK LODGE NO. 775 and
W. M. MUNDEN.

HAROLD G. HEISS,

RUSSELL B. DAY,

714 Keith Building,

Cleveland 15, Ohio

WILLIAM G. MAUDIN,

415 Bank of Commerce Building,

Norfolk, Virginia,

Attorneys for said Respondents.

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W. M. MUNDEN.**

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 55) is reported in 140 F. 2d 35. The opinion of the United States District Court for the Eastern District of Virginia (R. 36) is not reported.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Fourth Circuit was entered on January 10, 1944, (R. 59). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U. S. C., Section 347).

STATEMENT OF THE CASE.

Petitioner, a negro fireman employed by the Norfolk Southern Railway Company, brought this action in the District Court of the United States for the Eastern District of Virginia on behalf of himself and other negro firemen employed by that railroad against the Railway Company, the Brotherhood of Locomotive Firemen and Enginemen, two subordinate lodges of that railroad labor union, and an officer of one of the local lodges.

The gravamen of the complaint is that the petitioner as a fireman employed by the respondent railway company had acquired certain contractual rights in the nature of seniority rights; that the Brotherhood as the bargaining agent of the whole craft of firemen had negotiated a certain agreement with the railway which modified the seniority rights in a manner that discriminated against petitioner; and that thereby petitioner suffered detriment with respect to his seniority rights, sometimes referred to as assignments. The complaint asks for a declaratory judgment that the union, as bargaining representative, is bound to represent fairly and impartially all members of the craft; an injunction restraining the defendants from enforcing or operating under the agreement complained of insofar as it discriminates against negro firemen, and restraining the union from acting as the bargaining representative of the negro firemen so long as it refuses to represent them fairly and impartially; an award against the union for damages; and an order restoring petitioner to the assignment to which he claims he is entitled and of which he claims he was deprived.

The complaint contains no allegation of diversity of citizenship. It asserts jurisdiction under 48 Stat. 1185; U. S. C. Title 45, Chapter 8; U. S. C. Title 28, Section 41 (8); U. S. C. Title 28, Section 400; and the Federal Rules of Civil Procedure. Federal jurisdiction depends on

whether the controversy is one arising under the laws of the United States.

The return of the Marshal showed that no service whatever had been had on the Brotherhood and that no legal or proper service had been had on Ocean Lodge No. 76. These two defendants by timely motion, appearing specially, severally moved to dismiss the action as against them respectively, on the ground that no proper service had been made on them.

All of the defendants severally filed their motions to dismiss the action upon the grounds, *inter alia*, that the same did not arise under the Constitution or laws of the United States, that no sufficient basis of federal jurisdiction is alleged or appears from the complaint, and that no diversity of citizenship is alleged or shown.

The District Court decided that no federal question was presented and no jurisdiction inhered in that court to hear and decide the case. Accordingly, on May 7, 1943, it granted motions to dismiss filed by respondents, and entered judgment for the defendants and against the plaintiff.

From this judgment plaintiff (petitioner herein) appealed to the United States Circuit Court of Appeals for the Fourth Circuit, which, by its opinion rendered January 10, 1944 (140 F. 2d 35), affirmed the order of the District Court.

SUMMARY OF ARGUMENT.

I. Respondents, Brotherhood of Locomotive Firemen and Enginemen and Ocean Lodge No. 76, were not served with process, are not before the Court, and there is no jurisdiction of the person as regards said two respondents.

II. The essential and primary object of petitioner's complaint is to protect his alleged assignment rights (generally referred to therein as "seniority rights") which rights arise and originate solely out of contract.

4

III. Petitioner seeks to support federal jurisdiction by references to the Railway Labor Act, all of which are wholly unnecessary to the statement of the cause of action and are merely anticipatory of a probable defense thereto.

IV. Assuming, arguendo, that any federal question is presented by the complaint, such federal question is unsubstantial and insufficient as a basis of federal jurisdiction.

V. The judicial relief demanded by the complaint is not relief as to which jurisdiction is vested by the Railway Labor Act in the federal courts. Therefore, there is no federal jurisdiction in this case.

ARGUMENT.

I. Respondents, Brotherhood of Locomotive Firemen and Enginemen and Ocean Lodge No. 76, were not served with process, are not before the Court, and there is no jurisdiction of the person as regards said two respondents.

The return of the Marshal of service of the summons and complaint as to respondent Brotherhood of Locomotive Firemen and Enginemen is this: "Returned not executed as to the Brotherhood of Locomotive Firemen and Enginemen, no representative in this district." (R. 53.)

By timely motion under Rule 12 (b) of the Rules of Civil Procedure, the respondent Brotherhood of Locomotive Firemen and Enginemen, appearing specially, moved to dismiss the action on the ground that there had been no service of process on it; that it is a voluntary unincorporated association (cf. Complaint R. 2), and that no officer or trustee had been served with process; and that the court lacked jurisdiction of its person because there had been no service of process and this respondent was not before the court. (R. 25.)

Notwithstanding the return showing that no service on the respondent Brotherhood had ever been made, the

District Court held that it had been duly served and was properly before the Court; it overruled the motion to dismiss on the ground that no service of process had been had. (R. 50.) In the same judgment the District Court dismissed the complaint on the ground of lack of jurisdiction of the subject matter.

The action of the District Court in refusing to dismiss the complaint as to the respondent Brotherhood for lack of jurisdiction of its person was made the subject of complaint in the brief filed by that respondent with the Fourth Circuit. The point was not noticed in the opinion of the Circuit Court of Appeals for the Fourth Circuit.

It seems superfluous to argue that the Brotherhood, as to which the Marshal's return shows no service of process, is not before the Court unless service on its subordinate lodges be held to be service upon it.

Rule 17 (b) of the Rules of Civil Procedure provides that capacity to sue or be sued shall be determined by the law of the state in which the District Court is held.

Section 6058 of the Code of Virginia of 1936 reads as follows:

"All unincorporated associations or orders may sue and be sued under the name by which they are commonly known and called, or under which they do business, and judgments and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated. Process against such association or order may be served on any officer or trustee of such association or order."

Rule 4 (d) (3) of the Rules of Civil Procedure provides that service shall be made upon an "unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process ***"

This record shows no service on any officer, trustee, managing or general agent or any other agent authorized by appointment to receive service of process. No agent is authorized by law to receive such service (Code of Virginia, § 6058, *supra*). Service upon an officer of a subordinate lodge is insufficient and constitutes no service at all against the association. *International Brotherhood of Boilermakers v. Wood*, 162 Va. 517.

It further affirmatively appears from the record that respondent Ocean Lodge No. 76 has never been served with process and is not before the Court. The return of the Marshal as to this respondent is as follows:

"Not finding any representative of the within named Lodge (Ocean Lodge No. 76) I served a copy of the Summons together with a copy of the Complaint, by delivering same to Lucile Munden, she being the wife of W. M. Munden, and above the age of sixteen years and a member of his family at his regular place of abode at 1123 Hawthorne Avenue, South Norfolk, Va. for delivery to the within named W. M. Munden at his regular place of abode, a place within my District.

"R. L. Ailworth, United States Marshal,
by H. L. Trimyer, Deputy U. S. Marshal."
(R. 54.)

By timely motion respondent Ocean Lodge No. 76 appeared specially and moved to dismiss the action so far as concerned it, and to quash the purported service of summons on the ground that no proper service had been made on said Ocean Lodge No. 76, and the Court lacked jurisdiction over the person of that defendant. (R. 32.) The District Court in its final judgment held that Ocean Lodge No. 76 had been duly served and was properly before the Court. (R. 50.) Complaint upon this ruling was made in the brief filed by this respondent with the Circuit Court of Appeals. The point was not noticed in its opinion.

The Marshal's return does not state whether W. M. Munden or Lucile Munden are in any way connected with officers or trustees or agents of said Ocean Lodge No. 76. Even if it be assumed that W. M. Munden is an officer of said Ocean Lodge No. 76, service upon his wife is no service upon the Lodge. Section 6041, Virginia Code of 1936, provides, so far as pertinent here, as follows:

"A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person, or if he or she be not found at his or her usual place of abode, by delivering such copy and giving information of its purport to any person found there, who is a member of his or her family (not a temporary sojourner or guest) and above the age of sixteen years; or if neither he nor she, nor any such person be found there, by leaving such copy posted at the front door of said place of abode."

Section 6062 of the Code of Virginia of 1936 provides, so far as pertinent here, as follows:

"Any summons or *scire facias* may be served in the same manner and by the same person as is prescribed for the service of a notice under Section Six Thousand and Forty-one, except that when such process is against a corporation the mode of service shall be as prescribed by the two following Sections."

The two "following Sections" just above referred to are Sections 6063 providing for service of process on domestic corporations, and 6064 providing for service on foreign corporations. Neither provides for service on unincorporated associations which is covered only by Section 6058 hereinabove quoted. An unincorporated association in ~~Virginia~~ can be sued and served only by virtue of that section. *International Brotherhood of Boilermakers v. Wood, supra.* In Virginia, service against a domestic corporation can not be made by serving the wife of an officer, director or agent of a corporation. *Waterfront Coal Co.*

v. Smithfield Transportation Co., 114 Va. 482; *Burks Pleading & Practice* (3d Ed.) 74.

It is clear that Ocean Lodge No. 76 has never been served with process; and, by reason of its special appearance and its motion to quash the service and dismiss the action, it is not before the Court.

The basis of petitioner's complaint arises out of a contract which petitioner claims, invades his rights. Only one of the contracting parties—the railroad—is before the Court.

This point can properly be brought to the attention of the Court without the assignment of cross error or the entry of a cross appeal. The general principle is stated in *Moore's Federal Practice*, §3, 3394; 3577: "But the appellee may, even though he has not entered a cross appeal, defend a judgment on any ground consistent with the record, even if rejected below."

Supporting this principle are the following cases: *Langues v. Green*, 282 U. S. 531, 535; *Commissioner v. Havemeyer*, 296 U. S. 506, 509; *United States v. Curtiss-Wright Co.*, 299 U. S. 304, 330; *Morley Co. v. Maryland Casualty Co.*, 300 U. S. 185, 191.

Since this point is jurisdictional and goes to the right of any court, trial or appellate, to take cognizance of this action as regards respondents Brotherhood of Locomotive Firemen and Enginemen and Ocean Lodge No. 76, it may be raised at any time or in any manner, and, indeed, could be considered by the court *ex mero motu*.

II. The essential and primary object of petitioner's complaint is to protect his alleged assignment rights (generally referred to therein as "seniority rights"), which rights arise and originate solely out of contract.

The first requirement in resolving the question for decision is, the proper construction of the complaint. The rule to be followed for this purpose was stated by Mr.

Chief Justice Waite in the case of *Gold Washing and Water Co. v. Keyes*, 96 U. S. 199, and later quoted with approval by Mr. Justice Fuller in the case of *Chicago, Rock Island and Pac. Ry. Co. v. Martin*, 178 U. S. 245 (1900), as follows:

"A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States." The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . . Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, "in legal and logical form," such as is required in good pleading; that the suit is one which "really and substantially involves a dispute or controversy" as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States." (Italics ours.)

We therefore begin by asking, what right is it that the petitioner is apparently seeking to protect by this action, as disclosed by a study of the complaint, when consideration is given to only those statements of fact necessary to stating petitioner's cause of action "in legal and logical form, such as is required in good pleading."

A reading of the allegations of the complaint and the prayer for relief reveals one dominant consideration with which petitioner is concerned in this action, to-wit, his (seniority) right to be assigned to the Norfolk-Marsden run. He sues as an employee of the Norfolk Southern Railway. The significance of his alleged rights is described, and they are characterized as "valuable property rights." The fact is stressed that they form an integral part of petitioner's contract of employment with the defendant railroad. The emphasis placed by petitioner upon his alleged right to a particular assignment by virtue of a

contract of employment is readily understandable, for his case would obviously fail without allegation and proof of the existence of personal rights arising from contract with the employer.

Petitioner explains that for collective bargaining purposes the Brotherhood is the representative of all the firemen employed by the defendant railroad. Reiterated throughout the complaint is the charge that the Brotherhood wrongfully induced and forced the defendant railway company to remove petitioner and other negro firemen from their assignments and to replace them with Brotherhood members.

The Brotherhood is alleged to have entered into an agreement with the railway on February 18, 1941, later supplemented on May 23, 1941, the direct result of which was to deprive petitioner on October 10, 1941, of the right to act as fireman on the Norfolk-Marsden run. Petitioner's assignment (seniority) rights, he asserts, entitled him to that run, but it was given instead to a white locomotive fireman, a member of the Brotherhood.

Among the items of relief prayed for, petitioner asks that the defendants be permanently enjoined from making effective the agreement of February 18, 1941, and the supplement of May 23, 1941, in so far as they give to a white fireman jobs in violation of petitioner's alleged right to assignment on the Norfolk-Marsden run, and damages of \$25,000.00 from the Brotherhood for "the destruction of his rights as a locomotive fireman." The seemingly irresistible conclusion is that *the rights about which the action is dominantly concerned are contract rights.* They have allegedly been violated by the railroad and the Brotherhood, by action described as fraudulent.

It is fundamental that seniority rights, or what petitioner has chosen to call assignments, arise solely from agreement or contract negotiated with the employer (*Hartley v. Brotherhood of Railway and Steamship Clerks*, 283

Mich. 201, 277 N. W. 885; *Order of Railway Conductors v. Shaw*, 189 Oklahoma 665, 119 Pac. (2d) 549; *Ryan v. The New York Central R. Co.*, 267 Mich. 202, 255 N. W. 365; *Norfolk & Western R. Co. v. Harris*, 260 Ky. 132, 84 S. W. (2d) 69).

Protection of contract rights flows from the common law and it is such protection, as a critical examination of the complaint discloses, that is sought in this action. Petitioner would be entitled to relief in protection of his alleged assignment or seniority rights if he but establishes the existence of the claimed rights and their violation by the refusal of the railroad to permit them to operate the runs to which his rights entitle him, provided the defendants fail to establish in their own defense a superior right authorizing or permitting them to interfere with petitioner's alleged rights. Stated in a different way, petitioner would be entitled to relief upon establishing contract rights and subsequent failure of the railroad to accord him a job consistent with them, provided no justification for its action was alleged and proved by the railroad. Such a suit partakes of the character of breach of contract and would clearly be one at common law cognizable, if at all, in the state courts.

Petitioner describes himself as a fireman employed by the Norfolk Southern Railway Company. In June 1941, a fireman's job on a passenger run between Norfolk, Virginia, and Marsden, North Carolina, became vacant, and petitioner, "in accordance with his individual contract of hiring" (Complaint, R. 10) was assigned to the run. Petitioner held this job until on or about October 10th, 1941, when he was removed from it by the railway company at the insistence of the Brotherhood, in contravention of the "valuable property rights that have accrued to him while in the service of the defendant Railway Company" (Complaint, R. 11). Since that time petitioner has been forced, so he alleges, to accept less desirable work in yard assignments.

ments (Complaint, R. 11). And unless this Court requires the defendants to restore petitioner to the said passenger run and cease interfering "with his occupation as a locomotive fireman employed by the defendant Railway Company" (para. 3 of prayer, R. 13), he will "suffer irreparable damage" (Complaint, R. 11).

These are the primary facts giving rise to petitioner's grievance, as revealed by the complaint. A simplified statement of this grievance might be made thus:

That the plaintiff acquired "valuable property rights" during the course of his employment as a fireman by the Norfolk Southern Railway; that these rights entitled him in 1941 to a fireman's job on a certain passenger run, and he was accordingly assigned to this run. Some time later he was improperly removed from this assignment by the railroad through the influence of the Brotherhood. Irreparably damages followed.

Petitioner's alleged grievance is typical of many that have been presented to the courts in recent years, e.g. *Teague v. Brotherhood of Locomotive Firemen and Enginemen* (C. C. A. 6th), 127 F. 2d 53; *Steele v. L. & N. R. R. Co.*, 245 Ala. 113, 16 So. 2d 416; *Burke v. Union Pac. R. R. Co.* (C. C. A. 10th) 129 F. 2d 844; and *Barnhart v. Western Maryland Ry. Co.* (C. C. A. 4th), 128 F. 2d 709.

A substantial portion of the complaint has been devoted to explaining the circumstances under which, and reasons why, the Brotherhood induced the defendant railroad to remove petitioner on October 10th, 1941, from the passenger assignment. In making this explanation, petitioner undertakes to demonstrate that a federal question is involved in his cause of action.

Petitioner's explanation of the Brotherhood's action is that the Brotherhood has been the statutory representative, for collective bargaining purposes, of the firemen's craft on the Norfolk Southern Railway since the enactment of the Railway Labor Act on June 21, 1934. On Feb-

ruary 18, 1941, the Brotherhood negotiated an agreement with the defendant railroad for the purpose of regulating the future assignment of firemen to fill vacancies caused by the death, dismissal, resignation or disqualification of firemen. This agreement provided that such vacancies would be filled by only promotable firemen (white firemen), until such time as fifty per cent of the firemen's jobs were held by promotable firemen. The fifty per cent ratio between promotable and non-promotable firemen called for by the agreement was to be established notwithstanding the fact that it would in some instances require the assignment of promotable firemen to jobs when non-promotable firemen with greater seniority would be available for the assignment.

Petitioner alleges that the Brotherhood, in inducing the defendant railroad to remove him from the passenger run on October 10, 1941, was presuming to act in accordance with the terms of the February 18, 1941, agreement with the carrier.

Petitioner does not rest with this unnecessary explanation as to *why* the Brotherhood allegedly induced the defendant railroad to remove him from the passenger run on October 10, 1941. He takes the further step of charging that the agreement of February 18, 1941, is invalid, and bases its alleged invalidity upon the failure of the Brotherhood to observe toward the plaintiff and others the duties and limitations allegedly imposed upon it in the performance of its functions as a statutory representative by the Railway Labor Act.

III. Petitioner seeks to support federal jurisdiction by references to the Railway Labor Act, all of which are wholly unnecessary to the statement of the cause of action and are merely anticipatory of a probable defense thereto.

It is in the manner noted above that petitioner attempts to demonstrate, in the course of stating a cause of action based upon the violation of his contract of employment with the Norfolk Southern Railway, the possible existence of a federal question lurking amidst the issues comprising his case. He attempts to show the existence of a Federal question by the simple process of anticipating the issues that *may* be raised by one of the several defenses which *may* be asserted by the Brotherhood to this action.

Having pleaded the possession of contract rights which entitled him to a particular job or assignment, and the allegedly unwarranted interference by the Brotherhood with the enjoyment of those contract rights, so as to deprive him of the said job or assignment, with resultant damages, petitioner had stated a *prima facie* cause of action. It was then in order for the Brotherhood to plead its defense, or defenses, in justification of its action of having petitioner removed from his passenger assignment.

The defense could take any one of several forms. For example, the existence of the contract rights to the particular job or assignment claimed by petitioner might be challenged. Another defense might be that the seniority rights claimed by petitioner were the fruits of an earlier bargaining agreement made between the Brotherhood and the respondent railway, and that these rights were subject, in accordance with the express terms of the earlier agreement, to being modified by subsequent agreements between the same parties. Another defense could be a denial that the Brotherhood ever purported to be, or ever was in fact, the representative of the petitioner or other negro firemen for collective bargaining purposes. A still

further defense might be that the Railway Labor Act authorizes, or permits, the Brotherhood, acting as the representative of firemen, to negotiate with the respondent railway any agreement, including the agreement of February 18, 1941, which both deem to be in the interest and welfare of the employees and the railway. Other possible defenses to this action not involving a federal question can be suggested. We pause to assert that, if the Brotherhood should ever be required to answer the complaint, it will justify any agreement that it has made with the respondent railway on the ground that it was made in the interest of good railroad management.

Anent this latter point, an examination of the agreement of February 18, 1941 (R. 16) reveals a well integrated plan dealing with the employment of locomotive firemen and their training and promotion to the position of engineer, the primary objective of the plan being the creation and maintenance of an adequate corps of competent firemen and engineers. This is accomplished through the induction into service of a sufficient number of employees who are considered by the railroad as eligible to promotion to the position of engineer and who are, according to the plan sought to be established by the agreement, to be afforded an opportunity to become experienced in all aspects of engine operation and service as a necessary prelude to promotion and assignment to the exacting job of running a locomotive. Manifestly, justification for such an agreement can be found in an existing or impending shortage of firemen qualified to be engineers and in the prospective contribution to efficient operation.

We will analyze the more important provisions in the agreement to discover whether it conforms to the above pattern. Sections 1 and 2 pertain in large part to the hiring of firemen. In order that at least half of the firemen in each class of service shall be firemen in training for and in position to qualify themselves for the job of engineer,

it is provided that the proportion of non-promutable firemen shall not exceed fifty per cent in each class of service, and that until such percentage is reached on any seniority district only promotable men will be hired. Stated otherwise, in instances where the corps of firemen who are potentially engineers is less than fifty per cent of the total in employment, it is provided that no non-promutable firemen will be employed until the desired percentage is attained.

It is a matter of common knowledge that service as a locomotive fireman constitutes an apprenticeship for the position of engineer, qualification for which is achieved principally through practical familiarization with road conditions and the many types of engines or locomotives to which the fireman will be assigned in the course of his future duties as an engineer. To afford a sufficient opportunity for promotable firemen to acquaint themselves with road conditions and the variety of locomotives in use, provision is made in Section 2 (b) that, until the specified percentage is reached, new runs and vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. Under circumstances where non-promutable firemen greatly preponderate, it is obvious that, because they do not leave firing jobs for work as engineers; they may and do occupy the senior firing positions permanently and hence preclude promotable firemen from gaining the experience of operating such runs. Firemen who have never served on fast passenger or freight trains, for example, find it difficult to successfully perform the duties of engineer on such trains.

Section 6 requires all persons newly hired as firemen to demonstrate their qualification to hold firing jobs by passing two examinations prepared by the management within a period of three years. The penalty for failure to pass is removal from service. Promutable firemen passing such examinations are then required to submit to examinations for promotion to the position of engineer after

not more than four years of service as firemen, and upon qualification may be assigned as engineers when the need for additional engineers develops. Dismissal from service is the penalty attached to declination to take or failure to pass the promotion examinations. The ends sought to be achieved through application of this section are apparent without extensive explanation. The examinations are designed to develop proficiency in the respective services while the provisions relating to severance from service instances of inability to qualify insure the elimination of demonstrably incompetent workmen. It may be noted that only promotable firemen must subject themselves to the promotion examinations and the hazard of loss of employment incident thereto.

These statements of any one of the many forms which the defense might take disclose the existence of several defenses upon which reliance may be placed without involvement of any federal law or question in the defense. With these observations, we return to a discussion of the nature of petitioner's basic claim.

It is clearly apparent that the primary right which petitioner seeks by this action to protect is the right to hold the passenger assignment from which he was allegedly removed at the instance of the Brotherhood on October 40, 1941. This right does not flow from the Railway Labor Act. It is derived solely from a contract. And whether or not the Brotherhood's alleged interference with petitioner's contract rights was justified and lawful under the principles of the common law, or was authorized by the Railway Labor Act, are matters that belong to the defense and have no proper place, under the rules and principles of good pleading, in the complaint. Petitioner's cause of action, properly pleaded, will not disclose the existence of a federal question. The inclusion of unnecessary and argumentative matter in the complaint is simply an unwarranted anticipation of one defense, among several pos-

sible defenses, which the Brotherhood may rely on. Federal jurisdiction cannot be predicated on a federal question injected in this fashion into the complaint.

The jurisdictional question arose in *L. & N. R. R. Co. v. Mottley*, 211 U. S. 149, in a manner so clearly identical with the origin of the question in this case, that we believe the decision in that case should be controlling of the decision here. The bill of complaint in the *Mottley* case alleged that the plaintiffs, while passengers on the L. & N. Railroad, were injured. In settlement of the plaintiffs' claim for damages, the railroad agreed to provide the plaintiffs with annual transportation passes during their lives. This contract the railroad performed for many years, until 1907, when it declined to furnish renewal passes, and this action was brought to secure specific performance of the contract.

In both the *Mottley* case and the instant case, a contract was the source of the rights relied upon, and in each instance the plaintiff's contract rights were allegedly violated. The similarity of the cases goes further. In the *Mottley* case the complaint alleged that the railroad purported to justify its refusal to respect the plaintiffs' contract rights on the authority of a recently enacted federal statute regulating commerce, which statute forbade railroads giving free passes and transportation. The plaintiffs further alleged that such justification was unfounded because the federal statute did not apply to the giving of passes pursuant to a contract such as existed between the plaintiffs and defendant railroad, and in all events if the law was held to be applicable to the plaintiffs' contract, it would be invalid as being in conflict with the Fifth Amendment of the Constitution, because it would be depriving the plaintiffs of property without due process of law.

In a similar way the complaint in the instant case alleges, in substance, that the violation of petitioner's assignment (seniority) rights was accomplished, and pur-

ports to be justified by the Brotherhood acting under its authority as a representative of all the firemen on the defendant railroad for collective bargaining purposes in accordance with the provisions of the Railway Labor Act. But, the complaint further alleges, the Railway Labor Act does not authorize or permit the Brotherhood to disregard petitioner's seniority rights as it has. In all events, petitioner contends, if the Railway Labor Act does sanction such action by the Brotherhood as a representative, it is invalid as being in violation of the Fifth Amendment because it deprives him of property without due process of law.

The demurrer to the bill in the *Mottley* case was overruled, and the relief prayed for by the plaintiffs was allowed by the trial court. On appeal, this court observed the fact that the demurrer to the bill raised two questions of law, the first being whether the federal law prohibited the performance of the contract between the railroad and the plaintiffs, and, secondly, if the statute did have this effect, whether it violated the Fifth Amendment. The Court then proceeded with its decision as follows:

"We do not deem it necessary, however, to consider either of these questions, because, in our opinion, the court below was without jurisdiction of the cause. Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the Circuit Court which is defined and limited by statute, is not exceeded. This duty we have frequently performed of our own motion. (Citations.)

"There was no diversity of citizenship and it is not and can not be suggested that there was any ground of jurisdiction, except that the case was 'a suit . . . arising under the Constitution and laws of the United States.' Act of August 13, 1888, c. 866, 25 Stat. 433, 434. It is the settled interpretation of these words as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own

cause of action shows that it is based upon those laws or that Constitution. It is not enough that plaintiff alleges some anticipated defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution."

This court ordered the judgment reversed and the case remanded to the lower court with instructions to dismiss it for lack of jurisdiction. The rule of the *Mottley* case did not originate with that case. It had long previously been established, and has since been applied many times. See, for example, *Gully v. First National Bank*, 299 U. S. 111 (1936); *Campbell v. Chase National Bank*, 71 F. 2d 669 (C. A. 2nd, 1934); 94 A. L. R. 768, and Note.

The references in the complaint to the Brotherhood's status as a representative under the Railway Labor Act, and the duties that are in consequence imposed on the Brotherhood in its relations with the plaintiff are, of course, only conclusions of the pleader. Their presence in the complaint may be questioned on this ground. But we have undertaken to demonstrate that they are surplusage to a statement of the plaintiff's cause of action "in legal and logical form,"—that their only purpose is to anticipate a possible defence to the action. The statement that the Brotherhood is under a statutory obligation to represent the petitioner fairly and impartially and in good faith; that it must give him and all firemen reasonable notice, opportunity to be heard and a chance to vote on any action adverse to their interests; make prompt and full disclosure of all actions taken affecting petitioner's interests; and that the Brotherhood neglected its duties in these respects when it concluded with the railroad the agreement of February 18, 1941, and the supplement thereto of May 23, 1941, must be considered as raising issues no more than inci-

idental to the primary issue in this case, to-wit, the question whether petitioner's alleged assignment, seniority or contract rights have been unlawfully interfered with by the respondents. They must be considered as being only incidental to the primary issue, because petitioner's cause of action would be established in a *prima facie* sense if he but proved that his claimed rights were embodied in a subsisting contract between him and the railroad and that they were denied him by the railroad as a consequence of an agreement between the railroad and the Brotherhood. These incidental issues will arise and become relevant to the disposition of the case only in the event the Brotherhood admits the facts pleaded in the complaint and justifies its action as being within its lawful authority as a representative under the Railway Labor Act.

Perhaps the most that can be said concerning these incidental issues is that they constitute federal questions lurking somewhere in the background of this action. They may or may not become issues of importance, depending upon the future development of pleadings and events at the time of a trial. The necessity of distinguishing between the primary issue that serves to characterize an action as one arising under federal law, and incidental issues that may develop during an action but which cannot be the basis of federal jurisdiction, was explained and emphasized by Mr. Justice Cardozo in *Gully v. First Natl. Bank*, 299 U. S. 411 (1936), as follows:

"This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. (Citations) To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situation which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without

end. (Citations) Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by."

Our argument thus far has been addressed principally to the point that the references in the complaint to the Railway Labor Act serve only to anticipate a possible defense, and allegations of this character cannot avail as a basis of federal jurisdiction. The same argument is applicable with even greater clarity to petitioner's implied contention that the complaint states a cause of action arising under the Fifth Amendment.

Let us follow the innuendo by which the petitioner suggests that this action arises under the Fifth Amendment. The complaint alleges that the plaintiff has an individual contract of employment giving him certain property rights; that he has been deprived of these rights by an agreement and supplement entered into between the Brotherhood and the railroad, and acts done pursuant thereto. The complaint then explains that this alleged agreement and supplement were promoted by the Brotherhood in its capacity as a representative of petitioner under the Railway Labor Act, and that the Brotherhood was acting in fraud of the rights of petitioner and other negro firemen and in breach of its duty to them. From this petitioner argues that if the Railway Labor Act were construed so as to authorize or permit a representative to do as the Brother-

hood is charged by petitioner as having done, then and in that event, the Railway Labor Act would be violative of the Fifth Amendment. We doubt that petitioner urges with any seriousness that this method of anticipating an issue involving the Fifth Amendment provides an adequate basis of federal jurisdiction. The fallacy of any such contention can hardly be debatable in the light of the *Mettley* case and others applying the same rule. In *Tennessee v. Union & Planters Bank*, 152 U. S. 454, this court said:

"By the settled law of this Court, as appears from the decisions above cited, a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that or those laws."

A fortiori, a suit does not arise under the Constitution of the United States by including in the complaint an anticipated reply to an anticipated defense. That is what petitioner's reference to the Fifth Amendment in this case amounts to.

Moreover, the Fifth Amendment relates only to governmental action, federal in character, not to private persons, who, if they act on their own initiative and expressing their own will, do not offend the Constitutional guarantees, however else they may offend. *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, 127 F. 2d 33; *Talton v. Mayes*, 163 U. S. 376, 382; *Corrigan v. Buckley*, 271 U. S. 323.

There have been several recent cases wherein employees of railroads complaining of a breach of contractual relationship, suing the carrier or bargaining agent, or both, have sought to litigate in the federal courts and to support jurisdiction there by oblique references to federal railway legislation and/or the Constitution of the United States. The Circuit Courts of Appeals for the Sixth, Fourth and Tenth Circuits have unanimously denied federal jurisdiction in these cases.

• *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, *supra*, is indistinguishable from the present case. The plaintiff there was a negro fireman. The complaint was practically identical with the complaint in this record, and the relief sought was the same. The Circuit Court of Appeals for the Sixth Circuit denied federal jurisdiction and used the following language:

"... such rights as are here claimed arise from the individual contracts of the Negro firemen with the defendant Railroad. The appellant is unable to point to provision of the Railway Labor Act which protects such rights, or permits their invasion. The provisions of Sec. 2, subd. eighth, makes the terms of the collective bargaining agreement a part of the contract of employment between the carrier and each employee—the case, nevertheless, remains one based upon a contract between private parties cognizable, if at all, under state law."

Barnhart v. Western Maryland R. R. Co., *supra*, was another case in which an employee sued a railroad on a claim involving a breach of contract with elaborate references to federal railroad legislation as the sole grounds for federal jurisdiction. That jurisdiction was denied by the Circuit Court of Appeals for the Fourth Circuit, which said:

"The employment may have been inspired by the Act, but a right of action for the defendant's alleged breach of the contract does not arise from the Act; but only from the subsequent contractual relations of the parties. The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship."

Burke v. Union Pacific R. R. Co., *supra*, is another case where a railroad employee claimed that his seniority rights had been violated and his contractual rights infringed. The Circuit Court of Appeals for the Tenth Circuit denied federal jurisdiction, saying:

"No federal statute other than the Railway Labor Act is here in the instant case alleged to be involved, and only to the extent that plaintiff in part followed certain of its prescribed procedure, and that he had exhausted his remedies thereunder. He claims under the terms of a collective agreement for simple breach of contract, with no diversity of citizenship nor any alleged violation of any right guaranteed under the federal constitution, for damages either expressly or inferentially arising, in excess of interest and costs, in sum of more than \$3,000.00."

IV. Assuming, arguendo, that any federal question is presented by the complaint, such federal question is unsubstantial and insufficient as a basis of federal jurisdiction.

We have argued that petitioner's cause of action, as this is to be understood from a legal construction of the complaint, does not require any reference to the Railway Labor Act or the Constitution, and that the rule has been firmly established that federal jurisdiction can not be founded upon allegations in the complaint anticipating a probable defense that would create an issue involving the construction of a federal statute or the Constitution. It is our opinion that this case is controlled by the decision in the *Mottley* case. But, for the purposes of argument, and lest there be any aspect of the controversy overlooked, let us assume that to establish federal jurisdiction a probable defense involving a federal question may properly be anticipated in the complaint. Or, to serve the same argumentative ends, we may assume that the rights claimed by petitioner in the complaint, under the Railway Labor Act, are an integral part of, and essential to, the statement of petitioner's cause of action. The case would nevertheless be without federal jurisdiction, for the statutory rights asserted are so plainly nonexistent that the federal question appearing on the face of the complaint must be held to be

unsubstantial. The controlling rule of law in this respect was lucidly expounded by this Court in the case of *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103 (1933), as follows:

"Whether an objection that a bill of complaint fails to state a case under a federal statute raises a question of jurisdiction or of merits is to be determined by the application of a well settled rule. If the bill or the complaint sets forth a substantial claim, a case is presented within the federal jurisdiction, however the court, upon consideration, may decide as to the legal sufficiency of the facts alleged to support the claim. But jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial. The cases have stated the rule in a variety of ways, but all to that effect. (Citations) And the federal question averred may be plainly unsubstantial either because obviously without merit, or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

Another statement of the same rule, in a somewhat different manner but to the same effect, by Mr. Justice Holmes, is to be found in the case of *The Fair v. Kohler Die Co.*, 228 U. S. 22 (1913).

We understand this rule to be that a suit, although it purports to arise under a federal law, does not meet the requirements for federal jurisdiction under either of the following circumstances: First, when the alleged federal question has been so definitely resolved and settled by previous decisions of the United States Supreme Court that there is no longer any room left for reasonable doubt or controversy on the point. Second, when the federal question is found upon examination to be so devoid of merit that it is said to be "unsubstantial." This is not to say that a case which ultimately fails on its merits is thereby proved to be without federal jurisdiction. That obviously could not be the rule, for, if it were, federal jurisdiction

would exist only in those cases that were well founded on their merits. In the language of Mr. Justice Holmes (*The Fair v. Kohler-Die Co., supra*), "(Federal) Jurisdiction is authority to decide the case either way." But petitioner's claim that he is possessed of a federal statutory cause of action may be found, upon examination of the complaint and the statute or constitutional provision relied on, to be so wanting in merit that the result, in form at least, must be a denial by the court of jurisdiction of the case.

We believe that the claims made by petitioner in the complaint to rights bestowed upon him by the Railway Labor Act will be found, upon examination of the Act, to be so plainly without merit that petitioner's claim to a federal question in this action must be characterized as "unsubstantial."

We will first examine the complaint to learn what "rights" petitioner claims under the Railway Labor Act, or, in the alternative, to learn of the duties that the Act is said to impose upon a representative. The Act will then be considered to determine whether the claims are borne out.

The complaint asserts, as we understand it, that the Railway Labor Act imposes upon the Brotherhood the following duties when functioning as a representative:

1. The Brotherhood owes to each employee the statutory duty to represent him fairly, impartially and in good faith.
2. The Brotherhood owes to each employee the same duties, and must conform to the same standards of responsibility, that obtain between a common law agent and his principal.
3. The Brotherhood owes to each employee the right to be heard or consulted with respect to every contemplated move or action taken by it in its capacity as a representative; it owes to each employee the

opportunity of voting on every contemplated move or action, in order that the authority of the representative at any particular time may be established and known.

4. The Brotherhood is required to fully and promptly report the results of negotiations and dealings with the carrier to each employee whose interests are affected by its dealings with the carrier.

We gather from a study of Petitioner's contentions in the courts below that he finds, in three sentences in the Railway Labor Act, the source of the duties enumerated above. The first sentence is in Sec. 2, Fourth, and reads,—“The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.” The second is in Sec. 2, Ninth, and reads,—“Upon receipt of such certification the carrier shall treat with the representative of the craft or class for the purposes of this Act.” The third sentence is the definition of a representative, contained in Sec. 1, Sixth,—“The term ‘representative’ means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.”

From those three sentences petitioner has deductively fashioned a legislative mosaic of specifications defining the duties of a representative. He acknowledges that these representative's duties he professes to find in the Act are not set forth literally,—that they are revealed only through the process of implication.

Petitioner's contention is opposed by the significant fact that the Congress, had it desired so to do, could have incorporated in the Railway Labor Act specifications controlling the relationship of employees and their representatives,—could have defined their respective rights and duties. But Congress did not see fit to legislate upon the

subject, and it is not within the accepted province of the courts to arrogate to themselves the power to legislate, particularly when Congress has had an eminently favorable opportunity to legislate upon the subject-matter and declined to do so.

Petitioner contends that the Railway Labor Act must be "interpreted" by the courts, and by this process the respective rights and duties of employees and their representatives will be discovered. The suggestion is not appropriate to the case. The three sentences quoted above from the Railway Labor Act and relied on by petitioner as the source of his alleged rights are clear and unambiguous as far as they go. "Where the language of a statute is plain, there is no room for construction." *Eclipse Lumber Co. v. Iowa Loan & Trust Co.*, 38 F. 2d 608 (C. C. A. 8th, 1930). *Corona Coal Co. v. United States*, 263 U. S. 537. Interpretation and construction of a statute become necessary and proper only when the precise meaning of the legislative enactment is in doubt, or, one might say, is a matter of reasonable dispute. Here we have no such situation. There is no language to be found in the Railway Labor Act that is indicative of an intent on the part of Congress to define the respective rights and duties of employees and their representatives. The District Judge, in his opinion, found that the Act contained no provision defining the respective rights and duties of employees and their representatives (R. 36) his opinion reading in part:

"The question presented is whether or not the Railway Labor Act, after providing as it does, procedure for selecting a bargaining agent as sole representative of a craft or class and making it the duty of the Railway to recognize and treat with such bargaining agent, stops short without imposing any duty or obligation upon such bargaining agent to represent fairly and impartially the minority as well as the majority members of the craft or class, and without affording any remedy to the minority, in this instance the Negro fire-

men, for alleged wrongful and fraudulent misrepresentation such as is specifically and directly charged in the complaint.

"To state the question another way, are the minority members of a craft or class given any remedy by the Railway Labor Act of 1934, for alleged wrongs committed by the bargaining agent, or is the minority relegated for relief to the law of the state or states in which the wrongs are alleged to have been perpetrated?

"As already noted, the Railway Labor Act of 1934 provides for the members of a craft or class of an interstate railway to select a bargaining agent to represent that craft or class for the purpose of collective bargaining; and requires the Railway to recognize and treat with the agent so selected, *Virginian Railway Co. v. System Federation No. 40, etc.*, 300 U. S. 515, affirming Fourth Cir., 84 Fed. 2d 641, and the Railway can treat only with the agent selected by the craft or class, *Atlantic Coast Line R. Co. v. Pope*, Fourth Cir. 119 Fed. 2d 39. However, we search the Railway Labor Act in vain for any provision affording protection to the minority against wrongful, arbitrary or oppressive action of the majority through the bargaining agent which the majority has selected. The Act is silent in that respect. It stops short after providing for the selection of the bargaining agent and imposing upon the Railway the duty to treat with that agent alone after he is selected . . . Cf. *Teague v. Brotherhood of Locomotive Firemen and Enginemen* (C. C. A. 6th) 127 F. 2d 53, 56.

The petitioner, in reality, is not seeking *judicial construction* of a statute. He is, in effect, seeking to amend the Railway Labor Act by the process of *judicial legislation*. The reaction of the federal courts to such a proposal has been repeatedly recorded. This Court forthrightly stated its views on the subject in *Ebert v. Poston*, 266 U. S. 548 (1925) as follows:

"The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A *casus omissus* does not justify judicial legislation."

Other cases illustrating the declinations of federal courts to go beyond the proper function of a court as an interpreter of the laws, and to legislate, are the following:

- U. S. v. Mo. Pac. Rd. Co.*, 278 U. S. 269 (1929);
Wabash R. Co. v. U. S., 178 F. 5 (C. C. A. 8th 1910);
U. S. v. Mo. Pac. Rd. Co., 213 F. 169 (C. C. A. 8th 1914).

Numerous and cogent reasons could be advanced, if they were relevant to the ultimate question at issue, why Congress did not incorporate in the Railway Labor Act a specific declaration that the relationship between employees and a representative should be tantamount to that of principal and agent under the common law, and that an individual employee should have the other rights against a representative that petitioner urges in this case. Among them would be that the remedy of changing representatives, which is available at the hands of a mere majority and may be exercised as often as the majority wishes, is adequate as a means of eliminating an incompetent, officious or otherwise undesirable representative.

It is significant in this respect that the Railway Labor Act recognizes no relationship between membership in a labor organization and the attainment of the Act's objectives by the process of collective bargaining through representatives. There is the further reason that Congress recognized the inexpediency of attempting to police, through the agency of the courts, substantially all collective bargaining procedure throughout the length and breadth of the land. If this form of supervision is necessary under the Railway Labor Act, no reason can be suggested why it is not equally necessary to all of the collective bargaining sponsored by the National Labor Relations Act. A still further reason for not bestowing upon an individual employee or any minority group of employees the rights the petitioner is seeking to find in the Act, is the shock that it would be to

confident and dependable relations between the employer and the representative of the employees. The validity of collective bargaining agreements could be constantly called in question by disgruntled employees, on the basis of procedural derelictions of the representative or the unauthorized exercise of authority.

Of course, fraudulent action by a representative is not shielded by the Railway Labor Act, and authority for its eradication by the courts is inherent in any court of general jurisdiction, without regard for the terms of the Railway Labor Act.

V. The judicial relief demanded by the complaint is not relief as to which jurisdiction is vested by the Railway Labor Act in the federal courts. Therefore, there is no federal jurisdiction in this case.

Even if it be assumed that the complaint sets out a case which requires judicial construction of the Railway Labor Act, nevertheless the relief therein sought is not justiciable in the federal courts. A line of cases decided by the Court in 1943 seems conclusive on this point. *Brotherhood of Railway & Steamship Clerks, etc., v. United Transport Service Employees of America*, 320 U. S. 715; *Switchmen's Union of North America v. National Mediation Board, et al.*, 320 U. S. 297; *General Committee, etc., v. Southern Pacific Co.*, 320 U. S. 338; *General Committee, Missouri-Kansas-Texas R. R. Co., et al.*, 320 U. S. 323.

These cases announced the principle that when relief is sought in the federal courts under the provisions of the Railway Labor Act the case is not justiciable unless resort to the courts is expressly provided in the Act. This decision was arrived at after a comprehensive and philosophical review of cognate legislation over a period of fifty years. The Court, reviewing this legislation, commented upon the manifest intention of Congress to provide, as far as might be done, machinery for conciliatory methods and its en-

couragement of mediation and arbitration on a voluntary basis. The opinions in the *Missouri-Kansas-Texas* case and in the *Switchmen's Union* case emphasized the hesitancy of Congress to invoke the compulsions of the law upon delicate, controversial and explosive problems.

As stated in the *Missouri-Kansas-Texas* case (320 U. S. 335):

"Congress did not attempt to make any codification of rules governing these jurisdictional controversies. It did not undertake a statement of the various principles of agency which were to govern the solution of disputes arising from the overlapping of the interests of two or more crafts. It established the same general principles of collective bargaining and applied a command or prohibition enforceable by judicial decree to only some of its phases."

The conclusion of the Court is summarized in the same case (320 U. S. 337) as follows:

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in the field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration."

And in the *Switchmen's* case the opinion epitomized the basic principle thus (320 U. S. 302):

"On only a few phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. We need not recapitulate that history here. Nor need we reiterate what we have said in the *Missouri-Kansas-Texas R. Co.* case beyond our conclusion that Congress

intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate."

There is, in our judgment, a close parallel between the issues decided in the *Switchmen's* case and those which the petitioner seeks to raise in this case. This parallel is so complete that it deserves to be emphasized.

The complaint in the *Switchmen's* case was a challenge to the legality of the action of the National Mediation Board when it ruled that the provisions of the Railway Labor Act required it to treat all of the employees of a single carrier engaged in the same type of work as constituting a single craft or class. Integral with this action the Board ordered that an election be held among all the switchmen employed by the New York Central System for the purpose of electing a representative of the entire craft. The election was held, and a rival union of the Switchmen's Union was certified by the Board as the representative of all the switchmen employed on the New York Central System.

As stated above, the *Switchmen's* Union complained that the National Mediation Board had acted in a manner inconsistent with the provisions of the Railway Labor Act. Specifically, the *Switchmen's* Union contended that the Railway Labor Act not only did not compel the National Mediation Board to group all of the employees of a railroad system engaged in one class of work into one craft or class and be represented for collective bargaining purposes by one representative, but that the Act actually forbids such action by the National Mediation Board.

In short, the issue was whether the National Mediation Board had acted in a manner consistent with its statutory duties or obligations toward the *Switchmen's* Union and those represented by the Union.

This is precisely the character of complaint which the petitioner seeks to develop in the instant action, with the

only difference being that the object of the complaint in the *Switchmen's* case was the National Mediation Board, while the object of the complaint here is a representative of a craft or class whose appointment, and recognition by the carrier, is required, or at least authorized, by the Railway Labor Act.

Here the petitioner complains that the statutory representative has acted in a manner inconsistent with those provisions of the Railway Labor Act which allegedly define the duties and obligations of the representative. The petitioner seeks to have the federal courts review the action of the representative, interpret the pertinent provisions of the Railway Labor Act, and spell out the statutory duties and obligations of the representative under the facts alleged to obtain.

This Court held in the *Switchmen's* case that it had not been authorized by the terms of the Railway Labor Act to review the decisions of the National Mediation Board. That, in fact, the terms of the Act and the history of railway labor legislation manifested a congressional intention that labor issues of this character were not to be submitted to the courts for decision. The empirical approach of the Congress to the solution of railway labor problems by the process of trial and error should not be disregarded by the courts. They are to take jurisdiction only when specifically authorized by the Act to do so. The machinery of conciliation, mediation and arbitration should remain the primary means of effecting industrial peace on the railroad systems of the country unless, and until, Congress specially directs otherwise.

This is the substance of the Court's holding in the *Switchmen's* case, as we understand it. The considerations that brought the Court to the conclusion it arrived at did not stem from the fact that an administrative agency was the subject of the attack. They were derived from an appreciation of the intricate and technical character of

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carrier and employee relations, and a recognition of the fact that the field is appropriate for regulation by the Congress, not the courts.

These considerations apply with equal vigor in refutation of petitioner's contentions in the instant case. The fact that the agency whose action is assailed here is a statutory representative instead of an administrative board, as in the *Switchmen's* case, does not alter the underlying considerations that led the Court to the decision it arrived at.

This Court is being asked to review the Brotherhood's action, undertaken in its capacity as a statutory representative, of negotiating a contract with the defendant carrier for the purpose of determining whether such action was consistent with its statutory duties. But the Congress has not authorized the federal courts to review the procedure or means by which a representative performs its statutory duty of bargaining on behalf of a class or craft of employees. Neither has the Congress authorized the federal courts to examine into the validity of the agreements negotiated by the representative. The Railway Labor Act is silent on these matters.

We believe, therefore, that the absence of such grant of jurisdiction to the federal courts necessitates the same conclusion here as was arrived at in the *Switchmen's* case, to-wit, that the Congress intended controversial issues of this character to be settled by administrative action, or by the process of negotiation.

If individual employees are, or become dissatisfied with the terms of agreements made between a collective bargaining agent and a carrier because they alter or modify privileges enjoyed under earlier agreements, it would seem that such would be a condition or circumstance incidental to the process of collective bargaining. No doubt examples are plentiful of instances of dissatisfaction by employees or minority groups within a craft in respect of the terms of

the collective bargaining agreement affecting them. It should be clear that Congress has not as yet seen fit to authorize the submission of that type of dispute to the federal courts which would have as its obvious objective the elimination or adjustment of the alleged sources of dissatisfaction.

Petitioner, aggrieved by the provisions in the agreement of February 18, 1941, is either afforded an administrative remedy by the Railway Labor Act (as we think he is) or he finds himself in an "area where neither the administrative nor the judicial function can be utilized." In either case, resort to the courts is denied him.

The Railway Labor Act, § 3, First (i) provides that an individual employee or group of employees may be heard before the Adjustment Board for the adjudication of disputes with a carrier "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." And § 3, First (j) provides that such an employee or group "may be heard either in person, by counsel, or by other representatives, as they may respectively elect." This petitioner did not see fit to avail himself of the administrative relief thus proffered him. If he had done so, the award of the Adjustment Board would have been final and binding upon him § 3, First (m).

Pared down to its essentials, the complaint here is that petitioner and others for whom he professes to speak are minority members of a craft which has chosen a bargaining agent, which agent has made on behalf of the entire craft an agreement with the carrier unsatisfactory to the petitioner, because, as he alleges, it is discriminatory against him and the minority group of the craft for which he undertakes to speak. He asks the courts to declare the objectionable provisions of the contract unenforceable.

We may pass for the moment the difficulty of making any agreement on behalf of a craft satisfactory to all the

component members thereof. Petitioner claims that the bargaining agent selected by the majority of the craft is a union which denies him and all other negroes in the craft the privilege of membership therein, and—by inference and innuendo—therefore discriminated against the negro members of the craft.

A cognate state of facts was presented to this Court in *Brotherhood of R. S. Clerks v. United Transport Service Employees*, 320 U. S. 715. In that case some 45 negro red caps organized as a local chapter of United Transport Service Employees, a union which admitted negroes to membership, and with said union applied to the employer to recognize that union as their bargaining agent and to execute with the union, as such, a working and wage agreement. Upon refusal of the employer to recognize the United as bargaining agent for the red caps, the services of the National Mediation Board were invoked, and that tribunal held that the red caps were represented by the Brotherhood of Railway and Steamship Clerks as bargaining agent, and that the Brotherhood, as such agent, had already executed with the employer a working agreement by the terms of which the red caps were bound. The Brotherhood denied to negroes the privilege of membership.

Five of the red caps, suing for themselves and the others of the group, appealed to the federal courts to review the order of the Mediation Board. The situation of the minority group of negro red caps as a component part of the craft represented by the Brotherhood of Railway and Steamship Clerks was essentially identical with the situation of petitioner, and other negro firemen as a minority group in the craft represented in the present case by the Brotherhood of Locomotive Firemen and Engine-men. In each case the bargaining agent was a union which refused to admit them to membership, but nevertheless was authorized to make on their behalf contracts with the employer by which these groups were bound.

The District Court for the District of Columbia took jurisdiction of the case and reversed the order of the Mediation Board, holding that United must be certified by the Board to the employer as bargaining agent for the red caps. The Court of Appeals for the District of Columbia affirmed the District Court. In the opinion of Chief Justice Groner the situation of the negro group is thus graphically portrayed—^{137 F. 2d 821.}

"The Brotherhood, designated by the Board as the bargaining agent of the porters, is a white organization which does not permit membership by the colored employees of the railroads. As a result, the effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to membership, nor right to speak or be heard in its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation. That the rules of the Brotherhood make negroes ineligible to membership is not a matter which concerns us, but that the Brotherhood, in combination with the employer, should force on these men this proscription and at the same time insist that Brotherhood alone is entitled to speak for them in the regulation of their hours of work, rates of pay and the redress of their grievances is so inadmissible, so palpably unjust and so opposed to the primary principles of the Act as to make the Board's decision upholding it wholly untenable and arbitrary."

Nevertheless, this Court held that the case was governed by the principles it had announced in the *Missouri-Kansas-Texas* case and the other cases decided at the same time and cited above; and that the case was not justiciable.

These cases are controlling authority here. However any individual or group may be affected by action taken pursuant to the Railway Labor Act, litigation may not be resorted to unless expressly permitted by the Act. This Court has held that the courts may not decide the conflicting claims of organized groups to represent a craft, and

a fortiori they may not decide a dispute between an organized group, duly accredited as a bargaining agent for a craft, and an unorganized group within that craft.

It would seem manifest that the vesting of jurisdiction in the federal courts to decide such a case as is here presented would nullify the whole rationale of the opinion in the *Missouri-Kansas-Texas* case. Every agreement made by a bargaining agent with a railroad would be the subject of judicial scrutiny at the behest of any disgruntled member of the craft who might allege that the contract made by that bargaining agent on behalf of the craft with the railroad operated to his disadvantage. All stability of status between the railroad and its employees would be lost. The very purpose of the Act, peaceable settlement of labor controversies and the avoidance of interference by the courts, would be set at naught.

Every railroad must treat with the bargaining agent selected and with no other. *Virginian R. Co. v. System Federation*, 300 U. S. 515. In that case this Court said:

"More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern."

Contracts so made, pursuant to the Railway Labor Act and in obedience to the mandate of this Court, ought not to be subject to revision by the courts upon the demand of a member of the craft who considers himself aggrieved by the terms thereof. It clearly was not the intention of the Congress to provide that contracts should be made by railroads with a designated agency selected by the employees, and then permit such contracts to be abrogated, amended, or enlarged by the courts. That way chaos lies. Were such demands to be judicially entertained and decided, other individuals or groups within the craft might well claim

that the decision adversely affected them and ask for further modification of the contract collectively made by the bargaining agent with the railroad. Stable contractual status would be non-existent; far from being promoted, industrial peace would be rendered well nigh impossible.

It seems evident that this Court had cognate considerations in mind when it rendered the recent decisions exemplified by the *Missouri-Kansas-Texas* case.

CONCLUSION.

In recapitulation of the arguments developed in the several preceding sections of this brief, we reiterate that the record reveals beyond question the fact that there was not even an attempted service of process on the Brotherhood of Locomotive Firemen and Enginemen, and that the purported service on Ocean Lodge No. 76 is manifestly contrary to statute and decision, with the consequence that neither the Brotherhood nor said lodge are before the Court or under its jurisdiction in this proceeding. Petitioner by his complaint seeks a declaratory judgment involving, and an injunction against enforcement of, a contract only one party to which is before the Court, to-wit, Norfolk Southern Railway Company.

Without waiving this contention we submit that any fair analysis of the complaint leads to the conclusion that the purpose of this action is to protect petitioner's alleged seniority rights. The source of these rights is a contract—not the Railway Labor Act or other federal law. Petitioner alleges that the defendant railroad has refused to respect petitioner's alleged seniority rights and to accord him the runs to which they entitle him. The cause of action as thus stated and supplemented by allegations as to damages is complete, and it is not a cause of action arising under the Railway Labor Act.

The references in the complaint to the Railway Labor Act are wholly unnecessary and irrelevant to the statement

of the cause of action and serve only to anticipate a possible defense. We have shown that the injection of a federal question into the complaint by this means cannot be the basis for establishing federal jurisdiction. Many federal decisions have dealt previously with similar attempts to present a case commanding federal jurisdiction and uniformly jurisdiction has been denied. We believe that the rules thus announced are conclusive of the claim to federal jurisdiction in this case.

We have also analyzed the many references to the Railway Labor Act in the complaint on the assumption that they are vital to the statement of petitioner's cause of action. The Railway Labor Act has been examined in an effort to discover therein the rights claimed by petitioner. It has been revealed there is no language in the Act bestowing upon petitioner the rights claimed, and we have furthermore demonstrated that it is a rule of the federal courts to decline to legislate to the extent that would be necessary to sustain petitioner's claim under the Act. The purported federal question is hence unsubstantial, and federal jurisdiction cannot be predicated upon it.

We have shown that the relief demanded by the complaint is not such relief as federal courts may grant under the Railway Labor Act. In this relation we have reviewed the recent decisions of this Court in the *United Transport Service Employees, Switchmen's Union, Southern Pacific and Missouri-Kansas-Texas* cases which establish the principle that when relief is sought in the federal courts under the provisions of the Railway Labor Act the case is not justiciable unless resort to the courts is expressly provided for in the particular type of case. The anomaly which would be involved in the taking of jurisdiction of this action, while jurisdiction was declined in the four cases just alluded to, is difficult to state more clearly than in the language of the Circuit Court of Appeals:

"Closely analogous to the case at bar is the case of *General Committee, etc. v. Southern Pac. Co., supra*. That was a suit for declaratory judgment that provisions of an agreement between a carrier and a committee representing firemen concerning the demotion of engineers to firemen and the calling of firemen for service as emergency engineers were invalid under the Railway Labor Act. Complainants there based their right to relief upon the same provisions of the act guaranteeing employees the right to bargain collectively through representatives of their own, choosing as are relied on here; but the court held that the questions presented were not justiciable issues under the Act. The court said (64 S. Ct. 145): 'We are concerned only with a problem of representation of employees before the carriers on certain types of grievances which, though affecting individuals, present a dispute like the one at issue in the *Missouri-Kansas-Texas R. Co.* case. It involves, that is to say, a jurisdictional controversy between two unions. It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins. For the reasons stated in our opinions in the *Missouri-Kansas-Texas R. Co.* case and in the *Switchmen's* case, we believe that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts. We see no reason for differentiating this jurisdictional dispute from the others.'

"If the courts are without power under the provisions of the act relied on to declare a contract void because the association which negotiated it was not authorized to represent complainants, they are equally without power to make such declaration where the complaint is that it has not represented them fairly. If the courts may not under the act declare where the exclusive jurisdiction of one craft ends and the authority of another begins with respect to the right of collective bargaining, *a fortiori* they are without

power to declare the duties of a bargaining agent within the limits of his undoubted jurisdiction. It would be absurd to hold that the courts have power to declare a contract void because the bargaining agent has not properly and impartially represented different groups of employees, but are without power where he is not authorized to represent them at all. If the courts may not make a determination between conflicting rights of organized groups, it is difficult to see how their power should be extended by the mere fact that one of the groups is unorganized." (130 F. 2d 37.)

We have made the point that a decision investing federal courts with power to adjudicate such a case as herein presented would be an invitation to countless suits by disgruntled members of any craft of workers who might allege that the collective agreement made by their bargaining agent operated to their particular disadvantage. Judicial approval of this type of litigation would destroy the stability of relations between railroads and their employees, and the purposes of the Act to settle controversies by its conciliatory processes, without interference by the courts, would be nullified.

For the reasons discussed in this brief we submit that the complaint was properly dismissed.

Respectfully submitted,

HAROLD C. HEISS,

RUSSELL B. DAY,

WILLIAM G. MAUPIN,

Attorneys for said Respondents.

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Nos. 37 and 45

In the Supreme Court of the United States

OCTOBER TERM, 1944

TOM TUNSTALL, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775, ET AL.

BY WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

ESTER WILLIAM STELLA, PETITIONER

v.

KNOXVILLE & NASHVILLE RAILROAD COMPANY, BROTHERRHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS, AN UNINCORPORATED ASSOCIATION, ET AL.

BY WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1944

Nos. 37 AND 45

TOM TUNSTALL, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BESTER WILLIAM STEELE, PETITIONER

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, AN UNINCORPORATED ASSOCIATION,
ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

These cases raise issues as to the interpretation of the majority rule provisions of the Railway Labor Act. This brief is presented because of the importance of these questions to the administration both of that statute and of the National

Labor Relations Act, which contains similar provisions.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit in the *Tunstall* case (No. 37, R. 55-59) is reported in 140 F. (2d) 35. The opinion of the Supreme Court of Alabama in the *Steele* case (No. 45, R. 131-144) is reported in 16 So. 2d 416.

QUESTIONS PRESENTED

The questions considered in this brief are:

1. Whether, under the Railway Labor Act, a labor organization acting as representative of a craft or class, while it so acts, is under an obligation to represent all the employees of the craft without discrimination because of their race.
2. Whether the courts have jurisdiction to protect a minority of a craft or class against a violation of the above obligation.

STATUTES INVOLVED

The statute primarily involved is the Railway Labor Act, 48 Stat. 1185, 45 U. S. C., Sections 151 *et seq.* Its pertinent provisions, as well as those of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. Sections 151 *et seq.*, are set forth in the Appendix (*infra*, pp. 50-54).

STATEMENT

Although these cases come from different courts, their facts are substantially the same and

they present the same issues on the merits. Since motions to dismiss the complaints were sustained in each case, the facts are those alleged by the petitioners.¹

Petitioner in each case is a Negro locomotive fireman, suing in his own behalf and as representative of the Negro firemen as a class (No. 37, R. 5; No. 45, R. 84). A majority of the firemen on each of respondent railroads are white, and are members of the respondent Brotherhood of Locomotive Firemen and Enginemen,² but a substantial minority of the firemen are Negroes (No. 37, R. 6; No. 45, R. 83). Respondent railroads have dealt with the Brotherhood as the exclusive collective bargaining representative of the craft of firemen under the Railway Labor Act and petitioners and other Negro firemen have been required to accept the Brotherhood as their representative for the purposes of the Act (No. 37, R. 6-9; No. 45, R. 86-87), although the constitution and ritual of the Brotherhood exclude Negroes from membership solely because of race (No. 37, R. 6; No. 45, R. 83).

On March 28, 1940, the Brotherhood, purporting to act as representative of the entire craft of firemen under the Railway Labor Act, served a notice on 21 railroads in the southeastern portion

¹ In No. 45 the facts are taken from the "substituted amended complaint" (No. 45, R. 83-97).

² Other respondents are locals and members of the Brotherhood (No. 37, R. 2, 5; No. 45, R. 83-85).

of the country of its desire to amend the existing collective bargaining agreements covering firemen so as to drive Negro firemen completely out of service (No. 37, R. 8, 14-15; No. 45, R. 88-89, 59-60).² On February 18, 1941, the railroads entered into an agreement with the Brotherhood as the exclusive representative of the craft which provided that not more than 50 percent of the firemen in each class of service (freight, pas-

² The proposal was that only "promotable," (*i. e.*, white) men could be employed as firemen, or assigned to new runs or jobs, or permanent vacancies in established runs or jobs (No. 37, R. 14-15; No. 45, R. 59). The "Summary, Findings and Directives" of the President's Committee on Fair Employment Practice, relating to the "Southeastern Carriers Conference" or "Washington" Agreement (November 18, 1943, mimeograph p. 4), in describing the effect of these proposals, stated that if the carriers had agreed to them "it is clear that Negro firemen would have been rapidly eliminated. Being non-promotable, no more could have been employed and those already on the rosters could not have survived the proscription against their assignment to new runs and permanent vacancies."

Acting under authority of the Presidential Executive Order 9346, issued May 27, 1943, the President's Committee on Fair Employment Practice, conducted a public hearing in which it considered complaints filed by Negro firemen attacking the Southeastern Carriers Conference agreement as discriminatory and in violation of the Executive Order. On November 18, 1943 the President's Committee issued its "Summary, Findings and Directives" relating to the "Southeastern Carriers Conference" or "Washington" Agreement in which it directed the carriers and the railroad brotherhoods to set aside the agreement of February 18, 1941 and to cease discriminatory practices affecting the employment of Negroes. These "directives" have not been obeyed or complied with.

senger, etc.) in each seniority district should be Negroes, that until such percentage was reached all new runs and all vacancies should be filled by white men, and that Negroes should not be permitted employment in any seniority district in which they were not working (No. 37, R. 8-9, 16-17; No. 45, R. 89-90, 10-13). The agreement reserved the right of the Brotherhood to press for further restrictions on the employment of Negro firemen on the individual carriers (No. 37, R. 18; No. 45, R. 13). In No. 45, on May 12, 1941, the

* The President's Committee on Fair Employment Practice (*op. cit.*, note 3), described the effect of this agreement as follows: "Under the agreement finally entered into, it is apparent that the situation is only slightly less serious than that intended to be created by the Brotherhood. In the first place, according to the Agreement, white firemen are virtually guaranteed at least 50 percent of the jobs in each class of service, regardless of seniority, whereas there is no floor whatever under the number of Negro firemen. Secondly, the Agreement ended the employment of Negro firemen wherever they exceeded 50 percent. The ban against such employment has not been removed, even though these numbers are now below 50 percent of the total, and despite the existing firemen shortage. The carriers and the union have preferred to struggle along with insufficient and inexperienced men rather than utilize the services of experienced Negro firemen ready and willing to work. Thirdly, the Agreement sanctions prior contracts in force on some roads under which employment of Negro firemen is more severely restricted or has been eliminated entirely. One example is the Southern Railway Agreement which, depending on the District involved, limits Negro firemen to proportions ranging from 10 percent to 50 percent. Another is the St. Louis-San Francisco Agreement of 1928 which flatly prohibits their employment altogether. Fourthly, the percentage rule and the pro-

Brotherhood negotiated a supplemental agreement with the Louisville & Nashville Railroad Company further curtailing Negro firemen's seniority rights and restricting their employment (No. 45, R. 90, 13-21).

The complaints allege that in serving the notice of March 28, 1940, and in entering into the contract of February 18, 1941, and subsequent contracts, respondent Brotherhood, "maliciously intending and contriving to secure a monopoly of employment and the most favorable jobs for its own members, acted in fraud of the rights of plaintiff and the other Negro firemen and failed and refused to represent them fairly and impartially as was its duty as their representative under the Railway Labor Act" (No. 37, R. 9-10; cf. No. 45, R. 88-90).

It is also alleged that the Negro firemen were not given notice or opportunity to be heard with respect to any of these agreements, and that there was no disclosure of the existence of these agreements to the Negro firemen until they were put into effect to petitioners' detriment (No. 37, R. 9-10; No. 45, R. 88, 90).

In No. 37, as a result of the agreement, the

vision relating to vacancies and new runs have so greatly impaired the seniority rights of Negro firemen and inflated those of junior white firemen that the better jobs have become or are rapidly becoming the monopoly of white firemen. Consequently, Negroes have been and are being relegated to the lowest paid, least desirable jobs, to part time work and to extra or even emergency status."

Brotherhood, it is alleged, acting as representative of the craft of firemen, induced and forced the railroad to deprive petitioner Tunstall of his job, although he was serving to the satisfaction of the railroad as a fireman on an interstate passenger run, and to assign his job to respondent Munden, a member of the Brotherhood (No. 37, R. 10-11). Tunstall was assigned to a more arduous and difficult job with longer hours, in yard service (No. 37, R. 11). He requested the railroad to restore him to his prior position, but the carrier asserted that under the Railway Labor Act it could not do so unless the Brotherhood as his representative made the request (No. 37, R. 11). Tunstall then requested the Brotherhood to represent him for the purpose of having his assignment restored, but the Brotherhood refused even to acknowledge his request (*ibid.*).

In No. 45, although Negro firemen constitute a minority of the firemen on the Louisville & Nashville system, they comprised a majority in the passenger district on which petitioner Steele was employed (No. 45, R. 86). Until April 8, 1941, he was in a "Passenger Pool" to which five Ne-

¹ Tunstall had been assigned to the run in June 1941, after the white fireman previously assigned to it had taken another assignment. Inasmuch as there was only one other fireman, a Negro, in passenger service in that district, this shift gave colored firemen over 50 percent of the jobs in the district. On October 10, 1941, the Brotherhood, relying on the agreement, caused the railroad to remove Tunstall from the job and to assign it to Munden (No. 37, R. 10-11).

groes and one white fireman were assigned (No. 45, R. 91-92). These jobs were highly desirable from the point of view of wages, hours, and other considerations, and Steele was performing his work satisfactorily (*ibid.*). Following a change in the mileage covered by the pool, all jobs therein were declared vacant, on or about April 1, 1941, and the Brotherhood and the railroad, acting under the agreement, disqualified all the Negro firemen and replaced them with four white men, members of the Brotherhood, all junior in seniority to petitioner^{*} and no more competent or worthy (No. 45, R. 92). As a consequence, it is alleged, petitioner was completely out of work for 16 days, and then was assigned to more arduous, longer, and less remunerative work on local freight (No. 45, R. 93). He was subsequently replaced by a Brotherhood member junior to him, and assigned to work on a switch engine, which was even harder and less remunerative, until January 3, 1942, on which date he was reassigned to passenger service (*ibid.*). In this case also petitioner appealed for relief and redress to the railroad and the Brotherhood without avail (No. 45, R. 93-94).

* Steele's seniority dated from 1910, and that of the other colored firemen from between 1917 and 1922. The seniority of the four white firemen ran from 1917, 1925, 1940, and 1940, respectively (No. 45, R. 92).

¹⁴
The original bill in the instant case was filed August 30, 1941 (No. 45, R. 3).

In each case it was alleged that the Brotherhood has claimed the right to act, and has acted, as exclusive representative of the firemen's craft, and that in that capacity the Brotherhood has an obligation and duty to represent the Negro firemen impartially and in good faith (No. 37, R. 6-7; No. 45, R. 87-88), but that it has been hostile and disloyal to the Negro members of the craft and has deliberately discriminated against them and sought to drive them out of employment (No. 37, R. 7-10; No. 45, R. 88-90), and that the right of petitioners and other Negro firemen "to be represented fairly and impartially and in good faith * * * under the Railway Labor Act * * * has been violated and denied" (No. 37, R. 12; No. 45, R. 87-88).

In each case petitioner prayed (1) for an injunction against enforcement of the agreements made between the railroad and the Brotherhood inssofar as they interfere with the petitioner's rights; (2) for an injunction against the Brotherhood and its officers acting as representatives of petitioner and others similarly situated under the Railway Labor Act so long as the discrimination continued; (3) for a declaratory judgment as to their rights, including a declaration that the Brotherhood is under obligation to represent all members of the craft of firemen, including Negroes, fairly and without discrimination; and (4) for damages sustained by reason of the Brother-

hood's wrongful conduct (No. 37, R. 4, 12-13; No. 45, R. 96-97).*

In No. 37, petitioner Tunstall filed his complaint in the United States District Court for the Eastern District of Virginia (No. 37, R. 1-24), and in No. 45, petitioner Steele filed his original bill of complaint (No. 45, R. 3-21) and substituted amended complaint (No. 45, R. 83-98) in the Alabama Circuit Court of Jefferson County. Motions to dismiss and demurrers in each case (No. 37, R. 25-35; No. 45, R. 21-27, 98-122) were sustained by the trial courts (No. 37, R. 36-48; No. 45, R. 124-126), and these rulings were upheld on appeal by the courts below (No. 37, R. 59-60; No. 45, R. 131). In No. 37 the Circuit Court of Appeals for the Fourth Circuit declared that it had "considered whether jurisdiction might not be sustained for the purpose of declaring the rights of plaintiff to the fair representation for the purposes of collective bargaining which is implicit in the provisions of the National Railway Labor Act" (No. 37, R. 56), but felt bound to hold that it had no jurisdiction in view of decisions of this Court during the last term (No. 37, R. 55-59).² In No. 45 the Supreme Court of Ala-

* In No. 37 Tunstall also sought the restoration of the job to which he was entitled (No. 37, R. 13).

² *Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees*, 320 U. S. 715, 816; *Switchmen's Union v. National Mediation Board*, 320 U. S. 297; *General Committee v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *General Committee v. Southern Pacific Co.*, 320 U. S. 338.

bama held that it had jurisdiction over the controversy, but found on the merits that no cause of action was stated (No. 45, R. 131-144).

SUMMARY OF ARGUMENT

I -

The right of the organization chosen by the majority to be the exclusive representative of a bargaining unit exists only by reason of the Railway Labor Act. Implicit in the grant of such right is a correlative duty of the representative to act in behalf of all the employees in the unit without discrimination. Congress would not have incapacitated a minority or an individual from representing itself or his own interests without imposing upon the craft representative a duty to serve on behalf of the craft as a whole, and not merely for the benefit of certain portions of it favored as a result of discrimination against others.

The terms of the statute and its history support this interpretation. The word "representative" normally connotes action on behalf of those to be represented. The Act fulfills its purpose of peacefully settling disputes on a voluntary basis only when the employees have confidence that their representative in the negotiations is acting in their interest. And the Congress which incorporated the principle of majority rule in the Railway Labor Act and the National Labor Relations Act believed that, although the minority was

deprived of separate representation, it was not harmed inasmuch as it was to receive all the advantages which the majority obtained for itself. Clearly Congress did not intend the grant of exclusive authority to a representative to result in discrimination against individuals or minorities.

Upon the allegations in the complaints in these cases, the Brotherhood has entered into and is enforcing agreements which discriminate against the Negro firemen because of their race. This discrimination in the Brotherhood's conduct as representative is aggravated by its refusal to admit the colored firemen to membership, so that they do not have the protection which would flow from participation in the formulation of union policy.

In these circumstances, the Brotherhood is obviously not acting in good faith as the representative of the entire craft. This does not mean that a labor union as a private organization has no power to fix its own membership requirements. But when it seeks to exercise the exclusive statutory right, it must carry out the obligation to represent fairly which is inherent in that right.

II

The courts have jurisdiction to enjoin a union from acting as statutory representative so long as it fails to act without discrimination on behalf of all the members of the craft. The present cases are distinguishable from those decided at the last term in that none of the processes for conciliation,

mediation or arbitration and none of the administrative machinery established is available to safeguard minorities against discrimination by the majority. We do not think that Congress intended that a minority should be completely helpless in case of disregard by the statutory representative of its duty to act in behalf of the entire craft. In addition, the cases may be brought within the exception created by the *Texas & New Orleans* and *Virginian* decisions, (1) inasmuch as the duty to represent without discrimination is inherent in the doctrine of majority rule on which the statutory scheme rests, and this duty would be meaningless if the courts are denied jurisdiction to enforce it, and (2) to the extent that relief is sought against an employer for bargaining with an organization which, by reason of its discrimination, is not entitled to represent the craft. Furthermore, if the Act should be construed as depriving a minority of its right to self-representation without imposing an enforceable duty on the craft representative to act in good faith on behalf of the minority, a constitutional question would arise which would not be subject to the limitations set forth in the cases decided at the last term.

ARGUMENT

The issues presented by the instant two cases are closely related to those before this Court in *The Wallace Corporation v. National Labor Relations Board* and *Richwood Clothespin & Dish*

Workers' Union v. National Labor Relations Board, Nos. 66 and 67, this Term. In all four cases the basic issue is whether federal legislation, providing that a labor organization selected by the majority of employees in a unit shall be the exclusive bargaining representative, vests in the labor organization power to enter into a collective bargaining agreement under which the employer is required, on agreement sought by the labor organization, to discriminate against a minority group of employees within the unit whom the labor organization refuses to admit to membership. Equally applicable to all four cases is the related legislative history of the two Acts under which the respective cases arise, the Railway Labor Act and the National Labor Relations Act.

These cases differ from the *Wallace* cases, however, in that the discrimination here practiced was solely because of race whereas in the *Wallace* cases it was because of prior union affiliation. Unless the Railway Labor Act be construed so that the broad powers it vests in labor unions are held to be subject to the implied limitation that they cannot be used to discriminate because of race,¹⁰ constitutional issues are presented. These

¹⁰ For discussions of the Negro problem on the railroads, see Northrup, Herbert R., *Organized Labor and the Negro* (Harper & Bro., 1944), pp. 48-101; Spéro, Sterling D., and Harris, Abram L., *The Black Worker* (Columbia University Press, 1931), pp. 284-315; Cayton, Horace R., and Mitchell, George S., *Black Workers and the New Unions* (University of North Carolina Press, 1939), pp. 439-445.

cases also differ from the *Wallace* cases in that they involve no question as to the closed-shop. The Railway Labor Act, which contains no proviso similar to Section 8 (3) of the National Labor Relations Act, prohibits both closed and preferential shop agreements. Sec. 2, Fourth and Fifth; see 40 Op. A. G. No. 59, December 29, 1942.

I. THE RAILWAY LABOR ACT IMPOSES UPON THE REPRESENTATIVE OF A CRAFT THE OBLIGATION TO REPRESENT ALL THE EMPLOYEES WITHIN THE CRAFT WITHOUT DISCRIMINATION BECAUSE OF RACE

A. THE RIGHT AND POWER OF THE REPRESENTATIVE DESIGNATED BY A MAJORITY OF THE EMPLOYEES IN A CRAFT OR CLASS TO ACT AS THE EXCLUSIVE REPRESENTATIVE OF ALL THE EMPLOYEES IN THE CRAFT, OR CLASS ARE DERIVED FROM THE STATUTE

The Railway Labor Act provides (Section 2, Fourth):

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. * * *

Section 2, Second, and Section 2, Ninth, require carriers to bargain with the representative so chosen as the representatives of the employees of

the craft or class."¹¹ It is established that such a representative has the exclusive right to bargain collectively on behalf of all the members of the craft. *Virginian Ry. Co. v. System Federation*, 300 U. S. 515.

This right and power are a statutory creation. They differ materially from rights or powers which unions derive from employee designations, in the absence of statute, by operation of common law principles of agency. The statutory representative enjoys, in addition, the power to act for all the employees in the craft or class, irrespective of membership or individual authorization, with respect to "all disputes concerning rates of pay, rules, or working conditions" (Section 2) between the carrier and the employees. At the same time, because the carrier is under a duty "to treat with no other" representative (*Virginian Railway case*, 300 U. S., at p. 548), any union designated by a minority loses the right which it would have had

¹¹ Section 2, Second, reads as follows:

"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Section 2, Ninth, authorizes the National Mediation Board to resolve representation disputes by certifying the majority choice of the employees, and provides further that:

"Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this Act. * * *

under the common law to act in accordance with the authorizations which it has received. An adumbration of the extent to which the statute departs from the common law appears in the recent decisions of this Court in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342; *J. I. Case Co. v. National Labor Relations Board*, 321 U. S. 332, and *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678. It was held in these cases that, after the majority has chosen a representative, the minority cannot bargain through anyone else and cannot even bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining.

In holding in the *O.R.T.* and *Case* decisions that the benefits and advantages of collective action are available to each employee and cannot be forfeited by him through individual negotiations, this Court also recognized the necessary corollary, that where the majority "collectivizes the employment bargain," the individual must give up hope of securing for himself better conditions than those secured for him by the statutory representative (*Case* decision, 321 U. S. at pp. 338-339). And in the *Medo* case it held that even before the representative has entered into any contract, individuals or groups of employees may not bargain directly with the employer. Thus the statutory grant of power to the representative designated by the majority deprives individuals or minority

groups of the right to negotiate as to their conditions of employment which they would otherwise have possessed.¹²

B. THE RIGHT TO BE EXCLUSIVE REPRESENTATIVE IMPLIES A DUTY TO ACT ON BEHALF OF ALL EMPLOYEES IN THE UNIT WITHOUT DISCRIMINATION.

Implicit in the grant to the organization chosen by the majority of a bargaining unit of the exclusive right to represent all employees in the unit is the assumption that the representative will act in the interest of all employees, and that any contract made will redound to the benefit of the employees equally. The statutory right to represent the entire craft thus carried with it a correlative duty to do so in good faith.

In *J. I. Case Co. v. National Labor Relations Board*, 321 U. S. 332, this Court recognized that the collective bargaining envisaged in the Railway Labor Act and similar statutes was to be in the interest of all members of the class, when it said (321 U. S., at 338):

The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve

¹² It is to be borne in mind that the complaint in each case alleges that the Brotherhood was purporting to act as the representative of the craft under the Railway Labor Act (*supra*, pp. 3-4, 9). As to the legal situation had the Brotherhood sought to act only for its own members, see *infra*, p. 39.

the welfare of the group. Its benefits and advantages are open to every employee of the represented unit *

The Railway Labor Act has been similarly interpreted. The Emergency Board referred to in this Court's opinion in *General Committee v. Southern Pacific Co.*, 320 U. S. 338, 340, 342-343n, declared in 1937:

When a craft or class, through representatives chosen by a majority, negotiates a contract with a carrier, all members of the craft or class share in the rights secured by the contract, regardless of their affiliations with any organization of employees. * * * the representatives of the majority represent the whole craft or class in the *making* of an agreement for the benefit of all, * * *

And the National Mediation Board itself has given recognition to the same principle, stating:¹³

Once a craft or class has designated its representative, such representative is responsible under the law to act for all em-

¹³ National Mediation Board, *In the Matter of Representation of Employees of the St. Paul Union Depot Company*, Case No. R-635. This was the decision set aside in *Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees*, 137 F.2d) 817 (App. D. C.), reversed on jurisdictional grounds, 320 U. S. 715. The Court of Appeals was of the opinion that this principle not only required a representative to act in behalf of all the employees in the bargaining unit, but that an organization which excluded a minority from membership had no standing to represent it. See p. 37, *infra*.

ployees within the craft or class, those who are not members of the representatives' organizations as well as those who are members.

The consequences of allowing a majority, through its representative, to discriminate against other members of the unit, would leave the minority with no means of safeguarding its interests. As the instant cases show, this means not merely that the minority may be subjected to less favorable working conditions but that its right to earn a living in that occupation may be completely destroyed. Where the minority is also prevented from participating in the formulation of policies for the unit as a whole by exclusionary conditions of membership, there would remain no peaceful means of self-protection available to it.¹¹

Although there is no express mention of this particular problem, we think that the language and history of the Railway Labor Act and related legislation show that Congress has never contemplated that the majority rule provisions could be used to bring about discrimination against minorities in the bargaining unit.

1. The Terms of the Act

"Representative."—Section 2, Fourth, declares that the majority of the craft shall have the right

¹¹ We are not concerned in these cases with discrimination against members of a unit who participate in the democratic processes of determining the policy of the majority organization (see pp. 34-36, *infra*).

to declare who shall be its "representative". Section 1, Sixth, defines "representative" as meaning "any person or * * * labor union * * * designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

The use of the word "representative" in the majority rule provisions of the Act and the context in which it is found clearly import that the "representative" is to act on behalf of all the employees whom, by virtue of the statute, it represents. The definition adopts the word in its customary sense; the organization chosen is to act *for*, not against, the employees it represents. Since under the Act it is the representative of the entire unit and not merely of a portion of it, it must act on behalf of all the workers in the unit and not merely some of them. This is confirmed by the exclusive character of the representative's status. As we have shown (*supra*, pp. 15-18), individuals and minority groups in the craft are deprived by the Act of the right of separate representation for collective bargaining purposes. Clearly, Congress would not have so incapacitated them from advancing their own interests without imposing on the craft representative a duty to serve on behalf of the craft as a whole, and not merely for the well-being of certain portions of it favored as a result of discrimination against others of the craft.

This does not mean that the statutory representative is barred from making contracts which have unfavorable effects on some of the members of the craft or class represented. Differentiation between employees on the basis of type of work they perform or their competence and skill is, of course, permissible. Railroad labor contracts commonly include seniority provisions which afford preferential treatment to senior men, and mileage limitations which, on the other hand, protect junior members. In so far as seniority is concerned, each man has an equal opportunity to advance in rank. A junior worker has an interest in the security of those senior to him, since eventually he may receive similar benefits. Such familiar arrangements, even where they seem to discriminate against some members of the craft, look to the long-range benefits of the entire class and are properly aimed at serving "the welfare of the group" (*Case decision, supra*, 321 U. S. at p. 338). They are therefore within the scope of representative activity. But when an organization seeks and enters into an agreement with the deliberate purpose of discriminating against one portion of the craft and in favor of another, it is not acting as a "representative" as that term is used in the Act. Particularly is this so when the discrimination is based upon race, for then it cannot be said to result from economic considerations applicable throughout the craft.

"*For the purposes of this Act*". The term "representative" is used repeatedly in Section 2 in conjunction with the phrase "for the purposes of this Act" (Section 2, Third, Fourth, Ninth). Those provisions which deal with collective bargaining through representatives have as their purpose the avoidance of "any interruption to commerce or to the operation of any carrier engaged therein" (Section 2).¹⁵ This aim is sought to be achieved by encouraging "the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions" (*id.*). As this Court has recognized, the theory which underlies this reliance upon "voluntary processes"¹⁶ was that transportation service would not be interrupted by strikes where the parties, acting without coercion through their own representatives, reached "agreements satisfactory to both". *Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548, 569. In so far as the employees are concerned, the basis for their willingness to abide by any settlement is their confidence that their representatives are acting

¹⁵ See also *Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548, 565:

"* * * The Brotherhood insists, and we think rightly, that the major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'"

¹⁶ *General Committee v. M.-K.-T. R. Co.*, 320 U. S. 323, 337.

whole-heartedly in their interests. Manifestly, this purpose is frustrated where a substantial minority of the craft know at all times that their economic aims are to play no part at the conference table, that the end result of the bargaining process will not reflect in any way their own needs.¹⁷ If such a situation is permitted to prevail, the minority will be forced to accede or to rely on strikes as the only means remaining for their protection. Indeed, the execution and enforcement of contracts aimed directly at forcing them out of employment can only operate as a direct provocation to the activities disruptive of commerce which the Act is designed to eliminate.¹⁸

"Bargain collectively."—The representative is the agent through whom the employees are to

¹⁷ See the comment of the House Committee on the majority rule provisions of the National Labor Relations Act (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20):

"It would be undesirable if this basic scale should result from negotiation between the employer and unorganized individuals or a minority group, for the agreement probably would not command the assent of the majority and hence would not have the stability which is one of the chief advantages of collective bargaining."

The argument applies with only slightly diminished force where, as here, the agreement lays no basis for commanding the assent of the minority.

¹⁸ See the comment of the New Jersey Court of Errors and Appeals in *Cameron v. International Alliance etc.*, 118 N. J. Eq. 11, 26, 176 A. 692, 701: "The inevitable results are the loss of the services of useful members of society, and unrest, discontent and disaffection among the workers so restrained"

"bargain collectively." Collective bargaining implies that the bargain is to be in behalf of the entire unit which is a party to the negotiation, not in the interests of portions of the unit, whether individuals or minority or majority groups. That it was understood that the agreements would apply to the entire class of employees appears from the provision in Section 2, Seventh, that the working conditions which were not to be changed without notice and a conference between representatives were those of the "employees, *as a class* as embodied in agreements". [Italics supplied.]

2. The History of the Act

That these words and phrases, used in the provisions of the Act establishing the principle of majority rule, were designed to express the concept of good faith representation for all members of the unit appears from their legislative background.

Although the principle of majority rule was given governmental recognition by the Railroad Labor Board created by Title III of the Transportation Act of 1920,¹⁸ the meaning of the doctrine in respects pertinent here did not come into question until 1934, when attempts were first made to give it binding legal effect. During that year the Railway Labor Act amendments, which first

¹⁸ Decision No. 116, 2 Railroad Labor Board, pp. 87, 96.

'directly embodied the principle in a federal statute, were enacted, and the problem as to the meaning of majority rule was considered by the agencies administering Section 7 (a) of the National Industrial Recovery Act.²⁰

The legislative proceedings relating to the Railway Labor Act itself do not shed light on the issue here presented—whether the majority representative is under an obligation to act on behalf of all the members of a craft in good faith. The absence of any recognition that such a problem existed may have resulted from a legislative assumption that the agreement entered into by the craft representative would apply to all members in the unit without discrimination.

That this was probably the case is indicated by the contemporaneous history of Public Resolution No. 44²¹ (48 Stat. 1183), which dealt with the administration of Section 7 (a) of the National Industrial Recovery Act, and by that of the National Labor Relations Act. This Court has properly recognized from the beginning that the majority rule provisions of the latter Act and of the Railway Labor Act were intended to have the same meaning. Compare *Virginian Ry. Co. v. System Federation*, 300 U. S. 515, with *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44-45; *J. I. Case Co. v. National Labor Relations Board*, 321 U. S. 332, with

²⁰ (48 Stat. 193).

Order of Railroad Telegraphers v. Railway Express Agency, 321 U. S. 342. The material manifesting the intention of the Congress in the National Labor Relations Act is thus pertinent.

Section 7 (a) of the National Industrial Recovery Act, adopted June 16, 1933, provided that every code of fair competition should recognize the right of employees to "bargain collectively through representatives of their own choosing" (48 Stat. 198). During the first year of the administration of that Act, there was considerable difference of opinion as to the rights which this provision gave the majority of the employees in a bargaining unit.²¹ In the spring of 1934 Senator Wagner introduced the forerunner of the National Labor Relations Act (S. 2926, 73rd Cong., 2d Sess.). The bill, as reported out of the Senate Committee, contained a provision for majority rule when the Board so decided (Sec. 10 (a)). The proposed bill was not passed. In its stead Congress enacted Public Resolution No. 44 (48 Stat. 1183), which authorized the President to establish boards to decide controversies under Section 7 (a). The resolution was approved by the President on June 19, 1934, 2 days before he ap-

²¹ The principle of majority rule was apparently recognized by the National Labor Board but not by General Johnson and General Counsel Richberg of the National Industrial Recovery Administration. For a discussion of the problem during this period, see Lorwin and Wubnig, *Labor Relations Boards* (Brookings Institution, 1935), pp. 109-113, 268-272.

proved the Railway Labor Act of that year. Acting pursuant to this resolution, the President established the first National Labor Relations Board on June 29, 1934.

The Board thus established had occasion early in its history to make a complete examination of the question of majority rule. In *Matter of Houde Engineering Corp.*, (National Labor Relations Board (old) Decisions, July 9, 1934-June 1935, p. 35, decided August 30, 1934), the Board reviewed the history of the question (pp. 40-43), referring specifically to the recently enacted Railway Labor Act (p. 43), and firmly adopted the majority rule principle as applicable to the industries over which it had jurisdiction. But in taking this action, the Board was careful to point out "the limits beyond which it does not go" (p. 43). It held (p. 44):

Nor does this opinion lay down any rule as to what the employer's duty is where the majority group imposes rules of participation in its membership and government which exclude certain employees whom it purports to represent in collective bargaining * * * or where the majority group has taken no steps toward collective bargaining or has so abused its privileges that some minority group might justly ask this Board for appropriate relief.

One year later, Congress passed the National Labor Relations Act, and gave sanction to the action of the first National Labor Relations Board

in the *Houde* decision in applying the majority principle of the Railway Labor Act to other industries subject to Federal authority. In doing so, it made clear its intention to protect the rights of minority groups.

The House Committee (H. Rep. No. 1147, 74th Cong., 1st sess. pp. 20-21), cited and quoted the *Houde* case with approval, and stated:

There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given to nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.

* * * * *

Since the agreement made will apply to all, the minority group and individual workers are given all the advantages of united action. * * * * agreements more favorable to the majority than to the minority are impossible, for under section 8 (3) any discrimination is outlawed which tends to

"encourage or discourage membership in any labor organization."

The report then states (p. 22) that the principle of majority rule had been applied under Public Resolution No. 44, and "written into the statute books by Congress in the Railway Labor Act of 1934", thereby demonstrating that the Committee regarded the Railway Labor Act and the proposed bill as having the same meaning. The Senate Committee in charge of the bill, after pointing out that the majority rule had previously been incorporated in the Railway Labor Act, reported that (S. Rep. No. 573, 74th Cong., 1st Sess., p. 13):

* * * majority rule, it must be noted, does not imply that any employee can be required to join a union, except through the traditional method of a closed-shop agreement, made with the assent of the employer.²² And since in the absence of such an agreement the bill specifically prevents discrimination against anyone either for belonging or for not belonging to a union, *the representatives selected by the majority will be quite powerless to make agreements more favorable to the majority than to the minority.* [Italics supplied.]

It would be difficult to find words more clearly condemning action on the part of a representative

²² As has been noted, the one exception to the requirement of equal protection recognized in the National Labor Relations Act, the closed-shop contract, is expressly banned in the Railway Labor Act by Section 2, Fourth and Fifth. See 40 Op. A. G., No. 59, December 29, 1942.

directed to the exclusive benefit of its own members.

"Majority rule is at the basis of our democratic institutions." (H. Rep. No. 1147, 74th Cong., 1st sess., p. 21.) It was on this premise that Congress adopted the principle of majority rule in labor relations. The Report on the National Labor Relations Act noted at the same time that "the underlying purposes of the majority rule principle are simple and just" (*id.* p. 20), and that it is "sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions" (S. Rep. No. 573, 74th Cong., 1st sess., p. 13), under which the individual elected to office administers his trust after his election for the benefit of all, not merely for those who voted in his favor.²³ In the application of these democratic principles to the "orderly government of the employer-employee relationship" (*National Labor Relations*

²³ At the 1934 hearings on the Railway Labor Act (Hearings before the House of Representatives Committee on Interstate and Foreign Commerce, on H. R. 7650, 73rd Cong., 2nd Sess., pp. 33-34) Coordinator of Transportation Eastman said, "If a majority of the people, even a plurality, select a Congress, that is the kind of a Congress they get and that sits until the next election; when those in the minority have a chance to convert the others to their way of thinking. The same way with labor unions. * * * The will of the majority ought to govern; but there ought to be ample means so that the minority can have a chance to persuade others to their way of thinking and so that there can be an election, if they succeed in converting their minority into a majority."

Board v. Highland Park Manufacturing Co., 110 F. (2d) 632, 638 (C. C. A. 4)), the same "simple and just" requirements should prevail.

It thus appears that in fixing the exclusive right of representation in the organization selected by the majority in a bargaining unit Congress assumed that this meant that the representative would act in behalf of all the employees in the unit. Although Congress recognized that the minority was being deprived of pre-existing rights to act independently, this was justified on the ground that minorities and individuals would obtain all the advantages of the united action. Clearly Congress did not intend its grant of exclusive authority to result in discrimination against individuals or minorities. The history of the Act, taken together with the repeated use of the word "representative," with its normal connotation, and the statutory purpose of avoiding industrial strife through acceptance of the employees of decisions made by freely chosen agents acting on their behalf, all support a construction of the Act as requiring the representative of all the employees in a unit in fact to represent all—to act on behalf of all equally and in good faith.

This interpretation of the statute also finds support in the principle that a law should, if possible, be construed in a constitutional manner, or in a way which will avoid serious consti-

tutional difficulties. The harm resulting from discrimination by a statutory bargaining representative is not the injury which is done a principal by a faithless agent in the realm of private law. Here the agency rests not on the consent of the minority but on the command of Congress. An issue might well arise as to whether a law which subjected a minority to the unrestrained will of the competing majority and the employer, with no opportunity to protect its own interests, was an arbitrary deprivation of liberty without due process of law. Compare *Carter v. Carter Coal Co.*, 298 U. S. 238, 341.²⁴ If the statute were construed to permit such a discrimination because of race, it would also run counter to "our constitutional policy" against discrimination because of race or color. Compare *Mitchell v. United States*, 313 U. S. 80, 94.

C. ASSUMING THE TRUTH OF THE ALLEGATIONS OF THE COMPLAINTS, THE BROTHERHOOD, WHILE PURPORTING TO ACT AS REPRESENTATIVE OF ALL MEMBERS OF THE CRAFT OF FIREMEN, IS DISCRIMINATING AGAINST NEGRO FIREMEN

We have shown that the grant of the exclusive right of representation to the organization chosen by the majority of the craft presupposed that the representative would act in behalf of all the members of the craft in good faith. On the basis of the allegations of the complaints, it is clear that

²⁴ The authority of the *Carter* case on this proposition has not been impaired.

the Brotherhood has not fulfilled this obligation. It has discriminated against colored firemen both in the bargaining process and in its membership requirements. On the facts alleged (No. 37, R. 7-10; No. 45, R. 88-91), which are necessarily admitted by the filing of motions to dismiss, the Brotherhood, in securing the contracts, was "intending and contriving to ~~secure~~ a monopoly of employment and the most favorable jobs for its own members" (No. 37, R. 10); indeed its object was to force colored employees out of service completely (No. 37, R. 7-8, 10; No. 45, R. 88). The Brotherhood exerted every effort to advance the white firemen over the colored so as to deprive the latter of the positions and earnings to which their competence and seniority would otherwise entitle them (No. 37, R. 7-8; No. 45, R. 87-88). Petitioners Tunstall and Steele were compelled to accept inferior jobs, and Steele forced to quit work completely, because of this policy (No. 37, R. 10-11; No. 45, R. 92-93). It can hardly be claimed in these circumstances that the Brotherhood was acting on behalf of the Negro members of the craft.

The discrimination in these cases is aggravated by the fact that the colored employees have no opportunity to participate in the formulation of the policies which the Brotherhood maintains as the representative of the entire craft. For they may not become members of the Brotherhood and

may not take part in its deliberations. Thus they do not share in the protection against arbitrary or discriminatory action which is available to members of the organization. The officials of labor organizations which have achieved representative status under the National Labor Relations Act or the Railway Labor Act are to a large extent guided by the views of the members of the organization for which they speak. The latter have ultimate power to approve or disapprove. An individual employee who is a member of the representative union can go to meetings, participate in discussions, and obtain a hearing for his viewpoint. Even if his arguments do not prevail, the existence of such a forum in which the negotiators for the craft can be called to account has a tendency to avert arbitrary, unreasonable, or discriminatory action, and normally insures that such action will not be taken. Similarly, an employee who is not, but could if he chose be, a member of the union cannot complain of his own failure to take part in the deliberations which are to affect his working conditions. Moreover, he is a member of the group to which the union looks for support to maintain its status as statutory representative. Where, however, a union excludes a minority of the craft from membership, these ordinary controls upon the process of collective bargaining cannot benefit the excluded groups. In such a case the majority representa-

tive may feel free to ignore the interests of the minority, as is here alleged.²⁵

Certainly where an organization enters into agreements for the purpose of discriminating against employees in the bargaining unit who are not permitted to become members, it cannot be

²⁵ The National Labor Relations Board has stated (*Matter of Bethlehem-Alameda Shipyard, Inc.*, 53 N. L. R. B. 999, 1016):

"We entertain grave doubt whether a union which discriminatorily denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race. Such bargaining might have consequences at variance with the purposes of the Act."

In the *Bethlehem-Alameda* case, it was originally contended that the Board should not entertain a union's petition for certification as representative of the employees in a collective bargaining unit because the unit included Negroes who were allegedly excluded from membership in the petitioning union. It appeared, however, that subsequent to the hearing before the Board the petitioning union had made adjustments which the Board construed as expressing (53 N. L. R. B. at 1016) "a purpose on the part of the Council to accord to the Negro auxiliary locals the same rights of affiliation and representation as it accords to its other affiliated locals." On the assumption that the union would comply with that policy, the Board found it no longer necessary to decide the question first presented. In *Matter of Larus & Brother Co., Inc.*, Cases Nos. 5-R-1413, 5-R-1437, the National Labor Relations Board has ordered a certified organization to show cause why the certification should not be set aside on the ground, alleged by another union, that it does not admit Negro members of the unit to equal membership or bargain in their behalf as part of the unit.

said to be acting in good faith as the representative of the entire craft.²⁶

²⁶ The only prior decision on this point under the Railway Labor Act held that Congress never intended such "an intolerable situation" as to "force upon any class of employees representation through an agency with whom it has no affiliation nor right of association." *Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees*, 137 F. (2d) 817, 821-822 (App. D. C.). In that decision, which was reversed in this Court on jurisdictional grounds (320 U. S. 715), Chief Justice Grover, concurring, declared: (137 F. (2d), at 821-822):

" * * * the effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to membership, nor right to speak or be heard in its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation. That the rules of the Brotherhood make negroes ineligible to membership is not a matter which concerns us, but that the Brotherhood, in combination with the employer, should force on these men this proscription and at the same time insist that Brotherhood alone is entitled to speak for them in the regulation of their hours of work, rates of pay and the redress of their grievances is so inadmissible, so palpably unjust and so opposed to the primary principles of the Act as to make the Board's decision upholding it wholly untenable and arbitrary. The purpose of the Act, as is apparent on its face, and as has been recognized and confirmed by the Supreme Court and this Court in many decisions, is to insure freedom of choice in the selection of representatives. While it is true that this purpose has been held to yield, when necessary, in the interest of uniformity of classification in accordance with established custom; *nothing in the Act nor in its construction by the courts can be found to justify such coercive action as to force upon any class of employees representation through an agency with whom it has no affiliation nor right of association.* It is, therefore, of no consequence that the porters were at one time dependent upon Brotherhood as their spokesman with

This does not mean that a labor union as a private organization has no power to fix its own eligibility requirements, even if the result is to discriminate against persons because of their race. As long as the organization is acting solely in a private capacity, no legal objection may be made. But here the Brotherhood is exercising, and insisting upon exercising, the right granted by the Railway Labor Act to act as the exclusive representative of the entire craft of firemen. To the extent that the Brotherhood claims rights under the statute, it must carry out the duties which are inseparable from those rights. It cannot at the same time claim to be the statutory representative of all the employees in the craft and refuse to represent some of them. If it adopts the latter course, as is the case here, it does not follow that its discriminatory eligibility rules are illegal, but that while it fails to act in good faith on behalf of all the members of the craft it may not exercise the right to act as the statutory representative of the craft. It is relegated to the

the railroad, for that never was a trusteeship of their own making. To perpetuate it by law would be to impose a tyranny, in many respects analogous to 'taxation without representation.' And if anything is certain, it is that the Congress in passing the Act never for a moment dreamed that it would be construed to diminish *the right of any citizen to follow a lawful vocation on the same or equal terms with his neighbor.* In this view, to enforce the Board's decision would be contrary to both the word and spirit of our laws." [Italics supplied.]

capacity of a purely private organization, with the right to bargain on behalf of its own members only so long as no other statutory representative is designated.²⁷

An organization which is thus debarred from acting as exclusive bargaining agent under the statute might still bargain for its own members, if no other organization is chosen by a majority of the employees and if the carrier permits it to do so. But in that capacity it would have no exclusive rights, and no power to represent anyone else. The carrier would not be bound to bargain with it at all, and could not bargain with it for the entire craft. The colored employees in the class would be able to choose a different organization to act on their behalf and the carrier would be required to give that organization equal status; that is, if it bargained with one organization as representative for its members only, it would have to grant any other organization which requested it equal recognition.²⁸ See *Matter of*

²⁷ It is unnecessary to consider whether, in the absence of any statutory provisions, a union may enter into an agreement with an employer covering employees who do not and cannot belong to the union. Assuming that it can, since passage of the Railway Labor Act only a representative selected by the majority of a bargaining unit may bargain on behalf of the unit, and then only so long as it acts in good faith for the unit as a whole.

²⁸ This does not mean that the colored employees should be segregated in a separate bargaining unit. The National Mediation Board has stated its views as follows: "The Board has definitely ruled that a craft or class of employees

Berkshire Knitting Mills, 46 N. L. R. B. 955, 988-989, enforced in *Berkshire Knitting Mills*, *National Labor Relations Board*, 139 F. (2d) 134 (C. C. A. 3), certiorari denied May 22, 1944; *Matter of the Carborundum Co.*, 36 N. L. R. B. 710, 731.

may not be divided into two or more on the basis of race or color for the purpose of choosing representatives. All those employed in the craft, or class regardless of race, creed or color, must be given the opportunity to vote for the representatives of the whole craft or class." National Mediation Board, *The Railway Labor Act and the National Mediation Board* (August 1940), p. 17. The National Mediation Board has on several occasions refused to separate a minority of white persons from a craft a majority of whose members were colored. See *In the Matter of Representation of Employees of the Atlanta Terminal Co.*, Case No. R-75; *In the Matter of Representation of Employees of the Central of Georgia Railway Co.*, Case No. R-234. The National Labor Relations Board has also often held that: "The color or race of employees is an irrelevant and extraneous consideration in determining, in any case, the unit appropriate for the purposes of collective bargaining." (*Matter of U. S. Building Company*, 52 N. L. R. B. 382, 388.) See also *Matter of The American Tobacco Company*, 2 N. L. R. B. 198; *Matter of Union Envelope Company*, 10 N. L. R. B. 1147-1150-1151; *Matter of Brashear Freight Lines, Inc.*, 1 N. L. R. B. 194; 201; *Matter of Crescent Bed Company*, 2 N. L. R. B. 34, 36; *Matter of Georgia Power Company*, 3 N. L. R. B. 692; *Matter of Hughes Tool Co.*, 33 N. L. R. B. 1089, 1097-1099; *Matter of Aetna Iron & Steel Co.*, 3 N. L. R. B. 436; *Matter of Southern Wood Preserving Company*, 37 N. L. R. B. 25, 28; *Matter of Tampa Florid Brewery, Inc.*, 42 N. L. R. B. 642, 645-646; *Matter of Southern Brewing Company*, 42 N. L. R. B. 649, 652-653; *Matter of Columbian Iron Works*, 52 N. L. R. B. 370, 372, 374.

II. THE COURTS HAVE JURISDICTION TO ENJOIN A UNION FROM ACTING AS STATUTORY REPRESENTATIVE, AND AN EMPLOYER FROM BARGAINING WITH IT AS SUCH, SO LONG AS IT FAILS TO ACT WITHOUT DISCRIMINATION ON BEHALF OF ALL THE MEMBERS OF THE CRAFT.

In Point I we have contended that the provisions of the Railway Labor Act which provide for representation of a craft by the person or organization selected by the majority impose upon the craft representative a duty to act in behalf of all members of the craft in good faith. The question remains whether a minority has any remedy when the craft representative violates this obligation.

Inasmuch as the exclusive right of the majority representative and the duty to represent in good faith are created by the Railway Labor Act, a suit to enforce compliance with that obligation, whether by injunction or declaratory judgment, lies (unless the Railway Labor Act itself forbids) within the "original jurisdiction" of the federal courts over "suits and proceedings arising under any law regulating commerce". 28 U. S. C. Section 41(8). The cause of action in the *Tunstall* case thus "clearly had its origin [in] and is controlled by" the Railway Labor Act, and this is sufficient. *Peyton v. Railway Express Agency*, 216 U. S. 350; *Mulford v. Smith*, 307 U. S. 38, 46. In the *Steele* case, this Court may review the decision of the Supreme Court of Alabama under Section 237 (b) of the Judicial Code be-

cause a "right * * * is * * * claimed * * * under the Constitution" and a "statute of * * * the United States." Obviously the enforcement of duties created by the Federal Act should not be left exclusively to the state courts. Furthermore the ordinary requisites of equity jurisdiction and for the issuance of declaratory judgments are clearly present.

In the series of cases decided last term,²⁹ however, this Court narrowly circumscribed the situation in which the federal courts could take jurisdiction of cases involving the Railway Labor Act. We discuss briefly the application of these decisions to the case at bar.

A. These decisions were in large part predicated on the view that Congress intended controversial problems in the field of railroad labor relations to be resolved by the administrative agencies established by the Act³⁰ or voluntarily by "the traditional instruments of mediation, conciliation and arbitration" (320 U. S., at 332) without judicial intervention. Each of the cases was regarded as involving a "jurisdictional dispute",

²⁹ *Switchmen's Union v. National Mediation Board*, 320 U. S. 297; *General Committee v. M.-K.-T. R. Co.*, 320 U. S. 323; *General Committee v. Southern Pacific Co.*, 320 U. S. 338; *Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees*, 320 U. S. 715, 816.

³⁰ Compare *Switchmen's Union* and *Brotherhood of Railway Clerks* cases, *supra*.

which the Court thought to be determinable under the statutory scheme.

The reasoning that such matters should not be submitted to the judiciary would not seem applicable to the instant cases. For these cases involve no dispute as to who has been designated to represent the craft; all concede that the Brotherhood has been chosen as bargaining representative by the majority of the craft of firemen. Nor do the cases concern the drawing of a line between the functions of the representatives of various crafts. Only the single craft of firemen is involved. The National Mediation Board lacks the power which the National Labor Relations Board exercised in the *Wallace* cases to protect a minority in a craft from discriminatory terms of employment fixed in a contract negotiated by a union acting as their representative. Inasmuch as the interpretation of a contract is not involved, the cases do not fall within the jurisdiction of the National Railroad Adjustment Board. And disputes between a representative and employees in the craft are not covered by the provisions of the Act for mediation, arbitration or voluntary conciliation. Indeed they cannot be subject to those processes, which assume that employees will be heard through "representatives" (Sections 2, Second; 2, Sixth; 5, 6, and 7), since the controversy here is between individuals and minority groups in a craft who have no statutory repre-

sentative apart from the party acting adversely to their interests. Inasmuch as the Brotherhood is, according to the allegations of the complaint, seeking to drive the colored employees off the railroads; it would seem futile to refer the matter to conferences between the Brotherhood and the Negro firemen for a voluntary settlement; the Act certainly makes no provision for this type of conciliation.

Assuming the truth of the allegations, it is thus apparent that the petitioners are remediless unless the courts are open to them. We do not think that Congress intended that a minority should be completely helpless in case of disregard by the statutory representative of its duty to act in behalf of the entire craft. There is no suggestion in the history of the Railway Labor Act that Congress affirmatively desired to deprive minorities of the judicial protection which would otherwise be available as their sole means of enforcing their right to fair representation. In the absence of any such showing, the normal presumption would be that Congress wished that this right might be preserved in the customary manner, through the courts to which resort should be available to insure compliance with the laws of the United States.

It is, of course, true that the Act nowhere expressly authorizes the courts to decide such matters, and that there is language in the opinions of

last term which suggests that, apart from special situations previously recognized,³¹ the courts lack jurisdiction under the Act except where Congress expressly otherwise declares. But this Court did not then have in mind the present problem, with the consequence of the absence of a remedy and the unlikelihood that Congress would have intended the principle of majority rule to be used as an instrument for discrimination against minority employees. The Court has often recognized "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used" for the reason that while "the question actually before the Court is investigated with care, and considered in its full extent", the possible bearing of a decision "on all other cases is seldom completely investigated." *Cohens v. Virginia*, 6 Wheat. 264, 399, 400; *Humphrey's Executor v. United States*, 295 U. S. 602, 627.

B. 1. These cases may come within the reasoning of the same exception to the doctrine of last term's decisions as the *Texas & New Orleans* and *Virginian* cases. In the *Switchmen's Union* case (320 U. S., at 300), the Court declared that the purport of those leading authorities was that:

If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration

³¹ *Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548; *Virginian Ry. Co. v. System Federation*, 300 U. S. 515; *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177.

of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control.

See also *Stark v. Wickard*, 321 U. S. 288, 307. Just as the statutory right to collective bargaining might have been unenforceable without legal sanctions, so the duty imposed by the Act on the craft representative to act fairly on behalf of the employees represented would be meaningless if the courts are denied jurisdiction to enforce it. This duty, as has been shown *supra*, pp. 23-24, is inherent in the doctrine of majority rule. It too goes to the heart of the statutory scheme. For the theory of preserving industrial peace through bringing representatives of the disputing parties into agreement rests upon the assumption that their principals will be satisfied that the representatives have been acting fairly in their behalf.

2. The cases may be brought within the right of action recognized in the *Texas & New Orleans* and *Virginian* cases in so far as they are actions against the employer. Unless the Brotherhood was the statutory representative of the carriers' employees, the carriers violated the Act when they recognized the Brotherhood as such representative and entered into collective bargaining agreements with it on behalf of all the employees. Certainly when such recognition is given by a carrier to an organization which is *not* the lawful representa-

tive of its employees the unqualified right of the employees to select their representative "without interference, influence, or coercion" (Section 2, Third of the Act) and to "bargain collectively through representatives of their own choosing" (Section 2, Fourth of the Act), has been denied them. Exclusive recognition of a labor organization which is not a statutory representative has been held an interference with employee rights under the National Labor Relations Act. Cf. *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678, 697 (dissent).²² This is so because it imposes upon all in the unit an agent which is not its representative and handicaps the choice of a true representative; "once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of the employees" (303 U. S. 261, 267). The grant of that advantage, therefore, constitutes support of its recipient, and is illegal except where required by law. *Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548, 556-557, 560; the *Virginian Ry.* case, *supra*, 300 U. S., at 548.

While the Brotherhood in these cases was discriminating against Negro firemen it was not en-

²² Nothing in the majority opinion is inconsistent with the dissent on this point.

titled to act as the representative of the craft under the Act. A carrier accordingly had no right to recognize it as such, and under the doctrine of the *Texas & New Orleans* and *Virginian* cases the courts had jurisdiction to restrain a carrier from doing so.

C. The *Switchmen's Union* opinion implies that its limitation upon the scope of judicial power would not apply if "constitutional questions" were present. 320 U. S., at 301. Cf. also the dissent of Mr. Justice Frankfurter in *Stark v. Wickard*, 321 U. S., at 314: If the Act were construed as depriving a minority of the right to self-representation without imposing any duty on the representative of the entire craft to serve the minority's interests along with those of the craft generally, there would be serious question as to its constitutionality. Particularly is this so when the discrimination against the minority rests upon race. Cf. *Mitchell v. United States*, 313 U. S. 80, 94.³³ The due process clause would hardly permit Congress directly to provide that a minority of Negro employees must be represented exclusively through an organization which was acting in opposition to their interests because of their race.

We believe that Congress did not intend the

³³ "Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation." *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552, 561.

Act to have any such meaning. The consequences may be the same, however, if the majority representative is permitted to exercise the statutory right to appear and contract for the entire craft without any recourse being available to a minority group not fairly represented. The same factors, constitutional and otherwise, which support a construction of the Act as not depriving a minority of all substantive rights in such circumstances negative the existence of an intention to leave the minority remediless. But if the Act be interpreted as denying to all courts jurisdiction to protect the right of the minority to fair representation, these cases might present a constitutional question which in itself would require judicial determination.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

ROBERT L. STERN,

Special Assistant to the Attorney General.

ALVIN J. ROCKWELL,
General Counsel,

RUTH WEYAND,
JOSEPH B. ROBISON,
FRANK DONNER,
MARCEL MALLET-PREVOST,

*Attorneys,
National Labor Relations Board.*

NOVEMBER 1944.

APPENDIX

A

The pertinent provisions of the Railway Labor Act as amended in 1934, 48 Stat. 1185, 45 U. S. C., Section 151 *et seq.*, read as follows:

SECTION 1. When used in this Act and for the purposes of this Act—

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

GENERAL PURPOSES

SECTION 2. (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or

application of agreements covering rates of pay, rules, or working conditions.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, * * * or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization.

"Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate

order that such contract has been discarded and is no longer binding on them in any way.

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for

the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

B

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

SEC. 8. It shall be an unfair labor practice for an employer—

* * *

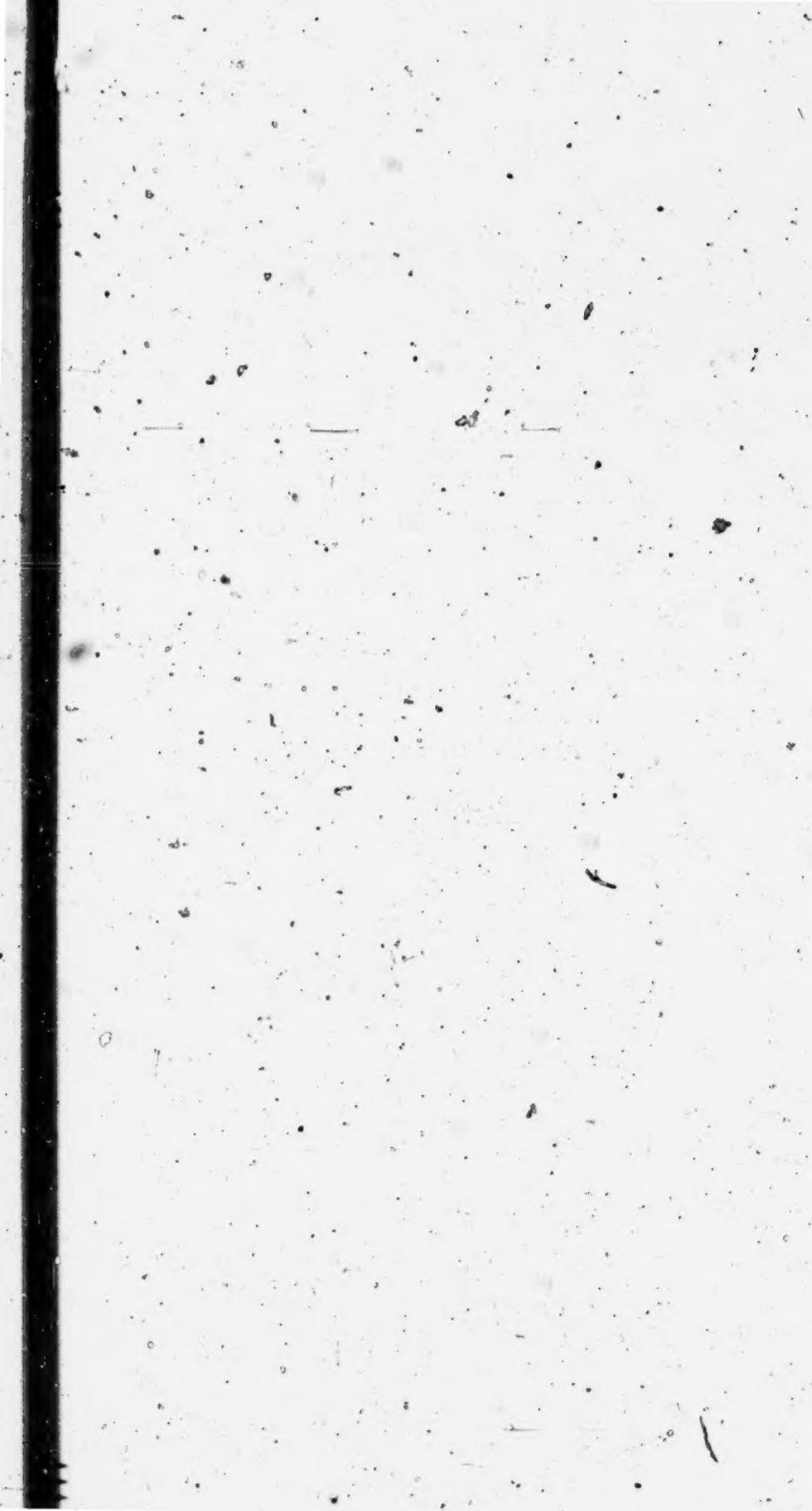
(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of

the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

- (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.



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IN THE

Supreme Court of the United States
October Term, 1944

Nos. 37 and 45

TOM TUNSTALL, *Petitioner*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775,
et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

BESTER WILLIAM STEELE, *Petitioner*,

v.

Louisville & Nashville Railroad Company, BROTHERHOOD
OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AN UNINCOR-
PORATED ASSOCIATION, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF ALABAMA.

**MOTION AND BRIEF FOR THE NATIONAL ASSOC-
IATION FOR THE ADVANCEMENT OF COLORED
PEOPLE AS AMICUS CURIAE.**

THURGOOD MARSHALL,

WILLIAM H. HASTIE,

*Counsel for National Association for
the Advancement of Colored People.*

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IN THE
Supreme Court of the United States
October Term, 1944

Nos. 37 and 45

TOM TUNSTALL, Petitioner,

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775,
et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

ESTER WILLIAM STEELE, Petitioner,

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD
OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AN UNINCOR-
PORATED ASSOCIATION, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF ALABAMA.

**MOTION FOR LEAVE TO FILE BRIEF AS
*AMICUS CURIAE.***

*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:*

The undersigned, as counsel for and on behalf of the National Association for the Advancement of Colored People, respectfully move this Honorable Court for leave to file the accompanying brief as *Amicus Curiae.*

2

The National Association for the Advancement of Colored People is a membership organization which for thirty-five years has dedicated itself to and worked for the achievement of functioning democracy and equal justice under the Constitution and laws of the United States.

From time to time some justiciable issue is presented to this Court, upon the decision of which depends the course for a long time of evolving institutions in some vital area of our national life. Such an issue is before the Court now. As will more fully appear in the accompanying brief, this Court is here asked to decide whether a labor organization which excludes Negroes from membership may lawfully obtain from national legislation power of governmental character over the employment of all persons in a defined area of industry and commerce and thereafter utilize that power to exclude Negroes because of their race from participation in the processes of collective bargaining and access to employment within the area in question.

The question is essentially whether our Constitution and laws permit the processes of government so to be perverted as to deprive the Negro of the right to earn a livelihood.

It is to present written argument on this issue, fundamental to life itself, that movants seek leave to file a brief *amicus curiae*.

Counsel for the petitioners has consented to the filing of this brief. Counsel for the respondents have been requested to consent, but have refused.

THURGOOD MARSHALL,

WILLIAM H. HASTIE,

*Counsel for National Association for
the Advancement of Colored People.*

IN THE
Supreme Court of the United States
October Term, 1944.

No. 37

TOM TUNSTALL, *Petitioner*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
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PORATED ASSOCIATION, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF ALABAMA.

**BRIEF FOR THE NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF COLORED PEOPLE AS
*AMICUS CURIAE.***

This Brief is presented by the National Association for
the Advancement of Colored People as *amicus curiae* before

cause of the importance of the issues involved to the protection of basic rights of Negro employees under the provisions of the Railway Labor Act and similar provisions of the National Labor Relations Act.

Opinions Below

Statutes Involved

The opinions below and the statutes involved are both set out in full in the brief of the United States as *amicus curiae* heretofore filed.

Questions Presented

1. Can a labor organization which refuses, on account of race, to admit employees within a craft or class to membership in the organization be the representative of that craft or class within the meaning of Section 2, Fourth, of the Railway Labor Act?
2. Is a collective bargaining agreement which by its terms requires a carrier to discriminate against employees within the craft or class because of race in apportioning work illegal under the Railway Labor Act?

Statement

The petitioner in each of these cases is a Negro fireman on a railroad in the southeastern portion of the United States. The respondents in each case are (a) the road on which each has been employed for many years, (b) the Brotherhood of Locomotive Firemen and Enginemen, a labor organization composed of white firemen on the nation's railroads which refuses to admit Negro firemen to membership or to represent their interests in dealing with

railroad managements; and (c) certain subordinate lodges and individual officers of the Brotherhood which have put the Brotherhood's discriminatory policies into effect on the respondent railroad to the detriment of the petitioner in each case (No. 37, R. 6; No. 45, R. 83). Petitioners sue in their own behalf and as representatives of all Negro firemen on the respondent railroads (No. 37, R. 5; No. 45, R. 84). They seek relief, one in the Federal courts and one in the courts of the State of Alabama, against discriminatory and oppressive practices on the part of the railroads and the Brotherhood which have deprived them of jobs which they would have held but for their race. The events involved in the instant cases are the culmination of a sustained effort on the part of respondents, continued over several decades, to eliminate Negro firemen from the Southern roads. In order to present the facts of this case in their proper perspective, we shall here outline briefly the history of the employment of Negro firemen on the railroads of the South.¹

The employment of Negroes as firemen on the Southern railroads is a practice which for decades has had complete and unquestioned acceptance by the public.² Until the ad-

¹ Authorities referred to in the following paragraphs include the following: Summary, Findings and Directives issued on November 18, 1943, by the President's Committee on Fair Employment Practice, relating to Parties to the "Southeastern Carriers Conference" or "Washington" Agreement (mimeograph); printed in full in appendix to Petitioner's Brief, No. 37 (pp. 58-67); Herbert R. Northrup, "Organized Labor and the Negro," Harper and Bros., 1944, pp. 50-191; Sterling D. Spero and Abram L. Harris, "The Black Worker," Columbia Univ. Press, 1931, pp. 284-315; Horace R. Cayton and George S. Mitchell, "Black Workers and the New Unions," Univ. of North Carolina Press, 1939, pp. 439-445.

See also Article, Lawyers Guild Review, I. J. A. Bulletin Section, Vol. IV, No. 2, March-April 1944, "The Elimination of Negro Firemen on American Railways—A Study of the Evidence Adduced at the Hearing Before the President's Committee on Fair Employment Practice," pp. 32-37.

² Spero and Harris, p. 284.

vent of mechanical stokers and Diesel engines in recent years, the fireman's job on an engine was grimy and arduous.³ In the first few decades of the century it was held in the South almost exclusively by Negroes, not only because of the nature of the work, but also because of the fact that the carriers were able to pay them lower wages than white firemen.⁴ This important incentive was removed during the first World War when the Federal Government, then operating the roads, adopted and applied the principle of equal pay for equal work.⁵ With the resumption of private operation after the war, the proportion of Negroes on the Southern firing forces began a decline which has continued ever since.⁶ The result has been that the proportion of Negro firemen on many roads has been reduced from a majority to a small minority.⁷ But the Negroes who remain have greater seniority than most of the white firemen who constitute the majority.⁸

The Brotherhood of Locomotive Firemen and Engine-men admits no Negroes to membership (No. 37, R. 6; No. 45, R. 83). Since early in this century it has endeavored to force Negroes out of the firing forces of the Southern roads and to replace them with its own white members.⁹ It has entered into contracts with carriers limiting the proportion of Negroes who may be employed as firemen in each class of service, in each seniority district on the contracting roads. These contracts are enforced without regard to

³ Cayton and Mitchell, p. 441; Northrup, p. 62.

⁴ Spero and Harris, pp. 289-290; Northrup, p. 49.

⁵ Spero and Harris, pp. 294-295; Northrup, pp. 50-51.

⁶ Northrup, pp. 52-54.

⁷ Northrup, pp. 52-54; Spero and Harris, p. 284.

⁸ Northrup, p. 54; Spero and Harris, pp. 441-442.

⁹ Spero and Harris, pp. 287-289, 307; Northrup, pp. 50, 65. According to Spero and Harris (p. 307): "In 1926 President Robertson of the Brotherhood of Locomotive Firemen told his convention that he hoped to be able to tell the next meeting that not a single Negro remained on the left side of an engine cab."

seniority so that senior Negroes are replaced by junior white firemen and deprived of positions which they would hold but for their race.¹⁰

In 1940, the Brotherhood moved for a sudden extreme acceleration in the gradual elimination of Negro firemen which the ban on hiring of Negroes and the contracts described above had already made inevitable.¹¹ It asked a number of Southern roads to enter into a contract which would have given all new positions, as fast as they were created by schedule changes or otherwise, to white firemen.¹² When the railroads rejected this proposal, the disagreement came before the National Mediation Board under the terms of the Railway Labor Act. The dispute was finally terminated by the execution, on February 28, 1941, of a single agreement between the Brotherhood and 21 Southern roads, including respondents herein, which is known as the Southeastern Carriers Conference Agreement (No. 37, R. 8-9; No. 45, R. 89-90, 10-13).¹³

Briefly, this agreement provides¹⁴ (a) that the percentage of Negro firemen in each seniority district, in each class of service, shall not exceed 50 per cent; (b) that where the percentage is in excess of 50 per cent the quota is to be reached by assigning new runs to white firemen; and (c) that all pre-existing contracts containing more restrictive clauses¹⁵ remain in effect and that further restrictions may

¹⁰ Spero and Harris, pp. 291-292, 306, 307; Northrup, pp. 52-54.

¹¹ Northrup, p. 63; Guild Review, p. 33.

¹² Northrup, p. 63.

¹³ Northrup, p. 63.

¹⁴ This and more similar contracts refer to Negro firemen as "non-promutable firemen"; that is, firemen who may not be promoted to the position of engineer. However, a supplementary agreement between the Brotherhood and respondent Norfolk Southern expressly provides that "the phrase '—non-promutable firemen—' refers only to colored firemen" (No. 37, R. 7-8; 13-16).

¹⁵ (*Ibid.*)

be made by separate contracts with individual roads. It was in purported compliance with this contract that petitioners were removed by respondent railroads, at the behest of respondent Brotherhood, from positions which they would have retained had the seniority practices of the railroads been applied regardless of race (No. 37, R. 10:11).

The complaint herein, the allegations of which are necessarily admitted, state that the Brotherhood's conduct of negotiations with the roads is designed "to secure a monopoly of employment and the most favorable jobs for its own members" (No. 37, R. 9-10; No. 45, R. 88-90). The Southeastern Agreement on its face shows the validity of this statement.

Brotherhood representatives are free to designate the better positions arbitrarily as "white men's jobs" and to force the Negroes, regardless of seniority, out of all but the most menial, irregular, and unremunerative work.¹⁶ An example of such exclusion by practice rather than by contract appears in the fact that although only four railroads have agreements oral or written, only two Southern roads allow such use on any but switching engines.¹⁷ In fact, it is no coincidence that the Brotherhood's intensified drive to take over the firemen jobs long held by Negroes is coincident with the recent increased use of Diesel and automatic stoker engines on the roads of this country. The years during which the Negro firemen have done the dirty work on the engines go for naught; they were not allowed to exercise their hard-won seniority to secure the easier berths to which their years of service entitled them.¹⁸

The net result of the policies of the Brotherhood, condoned and put into effect by the carriers, is that the use of

¹⁶ Northrup, pp. 64-65.

¹⁷ Northrup, pp. 62-64.

¹⁸ Summary, etc. of the President's Committee, p. 5.

Negroes as firemen, long an established practice in the South, is rapidly coming to an end.¹⁹

In these cases, petitioners, both of whom have suffered through the application of the Southeastern Agreement to cause them to be transferred to poorer jobs, ask on behalf of themselves and all other Negro firemen on the respondent railroads that the courts issue injunctions restraining the railroads and the Brotherhood from enforcing all agreements between them which discriminate against Negro firemen and further restraining the railroads from dealing with the Brotherhood as, and the Brotherhood from acting as, the statutory representative of the Negro firemen so long as the Brotherhood continues to discriminate against them (No. 37, R. 4, 12-13; No. 45, R. 96-97). Petitioners also ask for damages sustained by reason of the discrimination and for a declaratory judgment setting forth their rights (*id.*). Petitioner Tunstall also seeks an order requiring the respondent Norfolk Southern Railroad to restore him to the job from which he was removed by reason of the Southeastern Agreement (No. 37, R. 13).

SUMMARY OF ARGUMENT

A labor organization which refuses because of race to admit to membership employees within a craft or class does not meet the requirements which the Railway Labor Act imposes as a condition precedent to any organizations qualifying to act as the exclusive statutory representative of such craft or class for purposes of collective bargaining. In providing that the representative chosen by the majority of the employees in a craft or class should be the exclusive representative of all employees in the craft or class for the purposes of the Act, Congress intended that only an organ-

¹⁹ Summary, etc., of the President's Committee, pp. 64, 65.

ization which was organized to practice genuine collective bargaining could serve as such a representative. It is a basic conception of labor relations and of the trade union movement that collective bargaining is a system whereby all employees, whose jobs bring them into competition with one another, participate by a democratic representative system of self-government in the determination of their conditions of employment. An organization which refuses to admit to membership all employees within the craft or class who are willing to abide by its reasonable rules or regulations is not practicing collective bargaining.

If the Railway Labor Act is construed to permit a labor organization, which refuses to admit employees because of race within the craft or class to membership, to be their exclusive representative, that act is unconstitutional. The powers which that Act vests in the statutory representative to fix the wages, hours and terms of employment of all employees within the craft or class irrespective of their consent or authorization, are governmental in character. It would be a denial of due process and equal protection to vest such powers over a Negro minority in a hostile white majority. It is not a denial of due process or equal protection to vest such powers in an organization in whose affairs all employees in the craft or class, white and colored alike, participate equally through membership, with the accompanying rights to attend and be heard at its meetings, to vote for its officers and its grievance and bargaining committees and to help shape the terms of its collective bargaining proposals.

II

A collective bargaining agreement which by its terms requires a carrier to discriminate against colored employees

and in favor of white employees within the craft or class, in apportioning work, is illegal. Where a carrier enters into such an agreement with a labor organization not qualified to act as the representative of the craft or class, the carrier thereby violates the Railway Labor Act. But even if the labor organization with which the carrier makes such an agreement is entitled to act as the exclusive statutory representative of the craft or class the agreement still violates the Railway Labor Act where all the white employees are members of that labor organization and none of the colored are members, for that Act requires the carrier and the representative to treat all employees within the craft or class equally, without discrimination in favor of those who are members of the contracting labor organization and against those who are not members.

Unless the Railway Labor Act is construed to prevent a carrier and a labor organization from entering into a collective agreement which discriminates in employment opportunities against Negro employees within the craft or class it is unconstitutional. The statutory grant of the powers of majority rule to a labor organization must be subject to the limitations of the Fifth Amendment. For the powers exercised by the labor organization in fixing terms of employment binding on a non-consenting minority, being governmental in character, cannot be exercised by the organization to which they have been delegated free of the constitutional restraints upon their exercise which would have bound Congress if it had exercised these powers directly instead of delegating them.

Furthermore, even if the collective labor agreement be treated as a mere contract between private parties, lacking any of the characteristics of governmental action, it is still invalid. The constitutional policy against race discrimination bars court enforcement of any contract requiring its

parties to practice such discrimination. Since no court could constitutionally enforce the contract this Court should declare its invalidity and enjoin the parties thereto from carrying out such discrimination.

ARGUMENT

Introduction

With the constantly increasing power which legislatures and courts are vesting in labor unions there must go an implied limitation that labor unions shall not use their greatly increased powers for purposes of discriminating as to employment opportunities because of race. The Negro worker like every other worker needs the protection of his government in the right to organize and bargain collectively through representatives of his own choosing. We recognize that Negroes who are employed in a craft or class can achieve the benefits of collective bargaining only where all employees within the craft or class bargain through one representative. No one has suffered more severely in the past from strife among workers forced to compete for jobs than the Negro. His wages have continually been driven down by the employer who played one group in the class or craft off against another. These evils have been counteracted in part by the National Mediation Board²⁰ and the

²⁰ The position of the National Mediation Board against setting up units on a Jim Crow basis has been summarized in one of its publications as follows:

"The Board has definitely ruled that a craft or class of employees may not be divided into two or more on the basis of race or color for the purpose of choosing representatives. All those employed in the craft or class regardless of race, creed, or color must be given the opportunity to vote for the representatives of the whole craft or class." National Mediation Board, The Railway Labor Act and the National Mediation Board (Gov't Print. Off., 1940), p. 17.

National Labor Relations Board²¹ in refusing to segregate employees of different races into separate units. The requirement that the union in order to be certified win a majority of the votes of employees, some of whom are colored, has gone far in many industries to induce unions to open

(Footnote continued from page 12)

The cases in which the National Mediation Board has rejected the request of a carrier or a union that Negro employees be segregated into a unit separate from the white employees are: *In the Matter of Representation of Employees of the Atlanta Terminal Co.*, Case No. R-75; *In the Matter of Representation of Employees of the Central of Georgia Railway Co.*, Case No. R-234.

²¹ The National Labor Relations Board has encountered the problem in a number of different settings. *In Matter of Crescent Bed Company, Inc.*, 29 N. L. R. B. 34, 36, "The Company [had] refused to grant exclusive recognition to the United because of the existence of a contract between it and the Independent * * * covering all the colored employees of the Company." The Board ruled that, "Since the contract * * * covers only the colored employees of the Company and the Act does not permit the establishment of a bargaining unit based solely on distinctions of color, we find that the contract between the Independent and the Company is no bar to a determination of representatives." In *Matter of Columbian Iron Works*, 52 N. L. R. B. 370, 372, 374, the Board held that a contract with a union which admitted only white employees was not a bar to an election, holding that the contract did not cover an appropriate unit because a unit could not be based on racial considerations. In *Matter of Utah Copper Company*, 35 N. L. R. B. 1295, 1300, the Board dismissed a petition for certification because the unit sought was inappropriate, stating, "the I. A. M. proposes to limit the Machinists unit to white employees, a limitation we have held not permissible." In *Matter of U. S. Bedding Co.*, 52 N. L. R. B. 382, 387-388, the employer and the A. F. L. objected to the establishment of an industrial unit on the ground that Negro employees in the unit outnumbered the white employees. The Board said, "a finding that the industrial unit is inappropriate because the majority of the employees in the unit are colored would be contrary to the spirit of the Executive Order and the established principles of this Board." In *Matter of Brashear Freight Lines, Inc.*, 13 N. L. R. B. 191, 201, the Board dismissed a complaint based on charges of refusal to bargain, it appearing that the union lacked a majority in the unit when the Negro employees whom the union claimed were not properly within the unit were counted in the unit.

The most usual cases are those in which either the employer or one of the unions seeking certification asks to have a small group of

(Footnote continued on page 14)

their doors to Negroes and by fair treatment to make a bid for their vote.²² There have, of course, been many unions

(Footnote continued from page 13)

colored employees excluded from the unit. The Board's oft repeated denial of such a request is usually phrased, "We have consistently held that, absent a showing of differentiation in functions which would warrant their exclusion, we will not exclude employees from a unit upon racial considerations. No such differentiation was established in the instant case." *Matter of Tampa Florida Brewery, Inc.*, 42 N. L. R. B. 642, 645-646; *Matter of Aetna Iron & Steel Co.*, 35 N. L. R. B. 136, 138; *Matter of Southern Breweing Co., Inc.*, 42 N. L. R. B. 642, 645-646. The Board has followed this policy throughout its history. *Matter of American Tobacco Co., Inc.* (Reidsville, N. C.), 2 N. L. R. B. 198; *Matter of American Tobacco Co., Inc.* (Richmond, Va.), 9 N. L. R. B. 579; *Matter of Union Envelope Company*, 10 N. L. R. B. 1147; *Matter of Floyd A. Fridell*, 11 N. L. R. B. 249; *Matter of Interstate Granite Corp.*, 11 N. L. R. B. 1046. The Board has applied the same rule to requests for units based on sex distinctions. *Matter of General Electric Co.*, 43 N. L. R. B. 453; *Matter of Swift & Co.*, 11 N. L. R. B. 950, 955; *Matter of McCall Corp.*, 8 N. L. R. B. 1087; *Matter of California Walnut Growers Ass'n*, 18 N. L. R. B. 493. The New York State Labor Relations Board has refused to establish a unit limited to Oriental employees. *In re World Chinese American Restaurant*, No. SE-6403, 8 E. R. R. 800.

²² Unfair labor practice cases before the National Labor Relations Board reveal numerous instances in which a union hitherto hostile to Negroes has opened its doors, even in the South. In many of these cases the facts strongly indicate that the white workers had come to realize they could only secure effective bargaining if they enlisted their colored fellow workers in the union. See *Matter of Ozan Lumber Co.*, 42 N. L. R. B. 1073; *Matter of American Cyanamid Co.*, 37 N. L. R. B. 578, 585-586; *Matter of Southern Cotton Oil Co.*, 26 N. L. R. B. 177, 180, 182, 183; *Matter of Memphis Furniture Mfg. Co.*, 3 N. L. R. B. 26, 31; *Matter of Tex-O-Kan Flour Mills Co.*, 26 N. L. R. B. 765, 787-790, 791; *Matter of Bradley Lumber Co.*, 34 N. L. R. B. 610. Nor is it always the white workers who organize the Negroes. There are instances of the reverse situation. *Matter of Rapid Roller Co.*, 33 N. L. R. B. 557, 566-567, 570, enforced 126 F. (2d) 452 (C. C. A. 7), certiorari denied, 317 U. S. 650. And colored workers have taken the lead in organizing their white fellow workers even in the South. *Matter of Scripto Mfg. Co.*, 36 N. L. R. B. 411, 414. For other Board cases showing the Negro being accepted by his fellow white workers as an active union participant see *Matter of Sewell Hats, Inc.*, 54 N. L. R. B. 278, enforced 143 F. (2d) 450 (C. C. A. 5), certiorari pending No. —, this Term; *Mat-*

(Footnote continued on page 15)

which have always admitted Negro employees on a basis of equality. Forty international unions, twenty six affiliated

(Footnote continued from page 14).

Matter of Western Cartridge Company, 43 N. L. R. B. 179, 196-200, enforced 138 F. (2d) 551, certiorari denied 64 S. Ct. 780, 372; *Matter of Brown Paper Mill Co.*, 36 N. L. R. B. 1220, 1227, 1229, 1233, enforced 133 F. (2d) 988 (C. C. A. 5); *Matter of Planters Mfg. Co.*, 10 N. L. R. B. 735, enforced 105 F. (2d) 750 (C. C. A. 4); *Matter of Crossett Lumber Co.*, 8 N. L. R. B. 440, 470.

²³ The reference following the name of each union is to the page of Peterson, Florence, Handbook of Trade Unions, American Council on Public Affairs (1944), where the membership provisions of the union's international constitution are set forth: International Federation of Architects, Engineers, Chemists, and Technicians, p. 27; United Automobile, Aircraft, and Agricultural Implement Workers of America, p. 33; Barbers and Beauty Culturists Union of America, p. 40; United Cannery, Agricultural Packing, and Allied Workers of America, p. 76; United Electrical Radio and Machine Workers of America, p. 105; United Farm Equipment and Metal Workers of America, p. 121; International Fur and Leather Workers Union, p. 134; United Furniture Workers of America, p. 136; United Gas, Coke, and Chemical Workers of America, p. 143; Federation of Glass, Ceramic and Silica Sand Workers of America, p. 145; Inland-boatmen's Union of the Pacific, p. 174; International Longshoremen's and Warehousemen's Union, p. 202; National Maritime Union of America, p. 228; International Union of Mine, Mill, and Smelter Workers, p. 245; American Newspaper Guild, p. 256; United Office and Professional Workers of America, p. 260; United Packinghouse Workers of America, p. 264; United Retail, Wholesale, and Department Store Employees of America, p. 330; United Shoe Workers of America, p. 344; State, County, and Municipal Workers of America, p. 352; United Steel Workers of America, p. 356; United Stone and Allied Products Workers of America, p. 361; United Transport Service Employees of America, p. 389; Transport Workers Union of America, p. 392; Utility Workers Organizing Committee, p. 401; International Woodworkers of America, p. 411.

²⁴ United Cement, Lime, and Gypsum Workers International Union, p. 81; Cigar Makers International Union of America, p. 84; United Hatters, Cap, and Millinery Workers International Union, p. 161; Hotel and Restaurant Employees International Alliance and Bartenders International League, p. 170; International Union of Wood, Wire, and Metal Lathers, p. 181; Progressive Mine Workers, p. 246; American Federation of State, County, and Municipal Employees, p. 354; Brotherhood of Sleeping Car Porters, p. 347; American Federation of Teachers, p. 372; United Wallpaper Crafts-men, and Workers of North America, p. 402.

with the Congress of Industrial Organizations,²³ ten with the American Federation of Labor²⁴ and four independent²⁵ have provisions in their international constitutions expressly providing that all workers within the jurisdiction of the union are eligible to membership therein regardless of race or color.

In the railroad industry the refusal of the National Mediation Board to break up units into racial groups has afforded the Negro worker no protection. There are several reasons for this. Railway unions were established before there was any requirement that they be designated by a majority of the class. The National Government has placed representatives of these unions upon adjustment boards with power to deny Negroes even the right to have their grievances heard by the carriers. In brief, the unions most hostile to Negroes have received the greatest statutory powers thus making the plight of the Negro railway worker worse than the plight of Negro employees in any other large industry.²⁶ The Negro firemen who until quite recently constituted a majority of the craft or class on many of the railroads in the South are fast being driven from the industry. This is being accomplished through the use of powers which both the carriers and the Brotherhood assume the Railway Labor Act vests in the Brotherhood as the representative of their craft or class. We believe the Railway Labor Act does not vest such powers in the Brotherhood. But, if it should be construed as vesting such powers then it would clearly violate the Fifth Amendment.

²³ International Airline Mechanics Association, p. 19; Foremen's Association of America, p. 132; United Mine Workers of America, p. 248; United Aircraft Welders of America, p. 405.

²⁶ Northrup, Herbert R., *Organized Labor and the Negro*, Harper's (1944), p. 48.

I

A labor organization which refuses, on account of race, to admit employees within a craft or class to membership in the organization cannot be the representative of that craft or class within the meaning of Section 2, Fourth, of the Railway.

Labor Act

A

Collective bargaining is a system whereby all employees whose terms of employment are being fixed participate within the union in determining the terms of their employment

The Railway Labor Act provides (Sec. 2, Fourth):

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of the Act. * * *

As this Court pointed out in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 346, "Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." The Court then concluded that since the practices and philosophy of the trade union movement considered it essential that the union have the power to fix the terms of employment of all employees within the unit to the exclusion of the negotiation of separate terms by any individual employee, Congress intended the representative

chosen by the majority to have such power. See, also *J. I. Case Co. v. National Labor Relations Board*, 321 U. S. 332 and *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678. The Court did not have occasion in those cases to consider what protections for minorities, if any, Congress intended to provide when it placed such powers in the hands of the representative chosen by the majority. Exponents of the trade union viewpoint have always justified the displacement of the right to bargain individually with the right of collective bargaining by arguing that the individual employee is so impotent in bargaining with his employer that instead of losing his freedom of contract, he, for the first time, gains freedom of contract when the employer must deal with a union through which the employee may make his wishes effective.²⁷ Every exponent of collective bargaining whom we have been able to discover has defined collective bargaining as bargaining by an organization to which each worker affected may belong as long as he obeys all its reasonable rules. This rationale of collective bargaining was explained to Congress by its proponents when the bills which became the 1934 Amend-

²⁷ "The case for or against collective bargaining turns upon the issue of competition and personal freedom. * * * Its opponents argue that it deprives the laborer of his individual liberty to dispose of his services upon such terms as he pleases; it is retorted that his individual freedom is an impotent abstraction and that he must endure the authority of a union, in whose control he has a voice, or else submit to the dictation of a business corporation." Hamilton, Walton H., *Collective Bargaining* in Encyclopedia of the Social Sciences, vol. III, p. 630. See also Reports of U. S. Industrial Commission, vol. 17, 57th Cong., 1st Sess., H. R. Doc. No. 186 Washington (1901), p. LXXVI; Webb, Sidney and Beatrice, *Industrial Democracy*, London (1920 ed.), pp. 217-218, 840-842; Mitchell, John, *Organized Labor*, Philadelphia (1903), pp. 3-4, 75; Yoder, Dale, *Labor Economics and Labor Problems*, New York (1933), p. 438; Daugherty, Carroll R., *Labor Problems in American Industry*, New York (1933), p. 415; Taylor, Albion G., *Labor Problems and Labor Law*, New York (1938), pp. 86-87.

ments to the Railway Labor Act of 1926 and the National Labor Relations Act were pending.²⁸ Thus the following colloquy took place between two Senators, both of whom were active proponents of both bills:²⁹

Senator Wagner. . . . I think it has been recognized that, due to our industrial growth, it is simply absurd to say that an individual, one of 10,000 workers, is on an equality with his employer in bargaining for his wages. The worker, if he does not submit to the employer's terms, faces ruin for his family. The so-called freedom of contract does not exist under such circumstances.

The only way that the worker will be accorded the freedom of contract to which, under our theory of government, he is entitled, is by the intrusion of the Government to give him that right, by protecting collective bargaining. When 10,000 come together and collectively bargain with the employer, then there is equality of bargaining power.

²⁸ S. 2926, 73rd Cong., 2nd Sess., which was the forerunner of S. 1958, 74th Cong., 1st Sess., which became the National Labor Relations Act, was pending before the Senate contemporaneously with S. 3266, 73rd Cong., 2nd Sess., which became the 1934 Amendments to the Railway Labor Act. The Senate Report on S. 2926 (S. Rep. No. 1184, 73rd Cong., 2nd Sess.) was submitted on May 26, 1934, while the Senate Report on S. 3266 (S. Rep. No. 1065, 73rd Cong., 2nd Sess.) was submitted on May 21, and the House Report (H. Rep. 1944, 73rd Cong., 2nd Sess.) on the comparison bill in the House was submitted on June 11, 1934. Because of the contemporaneous consideration of the two measures by Congress, as well as because Congress has stated in its reports that the collective bargaining features of the two bills were in substance the same (S. Rep. No. 573, 74th Cong., 1st Sess., pp. 13-14; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 22), this Court has treated the two Acts as having the same meaning. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44-45, which followed *Virginian Ry. Co. v. System Federation*, 300 U. S. 515 and *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342 which followed *J. I. Case Co. v. National Labor Relations Board*, 321 U. S. 332.

²⁹ Hearings before the Senate Committee on Education and Labor, 73rd Cong., 2nd Sess., on S. 2926 (March 14, 1934), p. 17.

Senator LaFollette. This is an application, is it not, of the same general principle which was involved in the Railway Labor Act, to the entire industrial field.

Senator Wagner. Exactly.

Similarly, Professor Robert L. Hale of the Law School at Columbia University testified:³⁰

If a man wants to work in a steel plant, he does not just go out and work according to his own ideas about how it should be worked; he has to join an organization. Normally in the case of a steel plant, he becomes an employee of a steel company, and then he has no freedom as to the details of his work whatever; he is a non-voting member of a society. Now, if he belongs to a union in a closed-shop industry, it is perfectly true he has no freedom to work without being a member of the union, but he has a little more freedom through the brotherhood of his union against the restraint imposed upon him by the employer.

Now, of course, any system of organization is liable to have faults at times. A union itself may possibly have faults, and sometimes it has been oppressive of its members, but it is in any event a choice between evils. Government of any sort has certain evils, or may have at particular times, but the only alternative is anarchy, where the evils would be much greater. If he is subject to be governed by the rules of his union he presumably has a little more control over what those rules are than if he is governed solely by the rules laid down by his employer.

The Senate Committee Report on the bill which became the National Labor Relations Act in listing the protections for minorities afforded by the bill stated:³¹

³⁰ Hearings before the Senate Committee on Education and Labor, 73rd Cong., 2nd Sess., on S. 2926, p. 216. To the same effect see the testimony of Dr. Francis J. Haas at p. 116.

³¹ S. Rep. No. 573, 74th Cong., 1st Sess., pp. 13-14.

An organization which is not constructed to practice genuine collective bargaining cannot be the representative of all employees under this bill.

We do not believe an organization can be said to be "constructed to practice genuine collective bargaining" when it is organized merely to further the aims of one of the racial groups within the unit, as is the Brotherhood in this case. On several occasions courts and administrative agencies have considered the question of whether a union which excluded employees within the unit from membership could serve as a statutory representative. The first consideration of that problem occurred in *Matter of Houde Engineering Corp.*, 1 N. L. R. B. (old) 35, 43-44 (August 30, 1934), which was decided by the National Labor Relations Board established under Public Resolution No. 44, 73rd Cong., H. J. Res. 375. In stating the general proposition that an employer had a duty to recognize the power of a union, chosen by a majority of the employees in an appropriate unit, to bind all employees in the unit, these three experts in the field of collective bargaining stated certain limitations on that proposition:

Nor does this opinion lay down any rule as to what the employer's duty is where the majority group imposes rules of participation in its membership and government which exclude certain employees whom it purports to represent in collective bargaining . . . or where the majority group has taken no steps toward collective bargaining or has so abused its privileges that some minority group might justly ask this Board for appropriate relief.

The next consideration of this question was by the Court of Appeals for the District of Columbia in *Brotherhood of Railway Clerks v. United Transport Service Employees*, 137 F. (2d) 817, 821-822, reversal on jurisdictional grounds, 320 U. S. 715. The Court of Appeals there set aside a

certification by the National Mediation Board of a union which excluded Negro employees. Chief Justice GROVER, concurring, stated (137 F. (2d), at 821-822)

* * * the Brotherhood, designated by the Board as the bargaining agent of the [Negro] porters, is a white organization which does not permit membership by the colored employees of the railroads. As a result, the effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to membership, nor right to speak or be heard in its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation. * * * that the Brotherhood, in combination with the employer, should force on these men this proscription and at the same time insist that Brotherhood alone is entitled to speak for them in the regulation of their hours of work, rates of pay and the redress of their grievances is so inadmissible, so palpably unjust and so opposed to the primary principles of the Act as to make the Board's decision upholding it wholly untenable and arbitrary. The purpose of the Act, as is apparent on its face, and as has been recognized and confirmed by the Supreme Court and this Court in many decisions, is to insure freedom of choice in the selection of representatives. * * * nothing in the Act nor in its construction by the courts can be found to justify such coercive action as to force upon any class of employees representation through an agency with whom it has no affiliation nor right of association. * * * to perpetuate it by law would be to impose a tyranny in many respects analogous to "taxation without representation." And if anything is certain, it is that the Congress in passing the Act never for a moment dreamed that it would be construed to diminish the right of any citizen to follow a lawful vocation on the same or equal terms with his neighbor. In this view, to enforce the Board's decision would be contrary to both the word and spirit of our laws.

The National Labor Relations Board has on two occasions expressed a doubt that a union which denied membership on racial grounds to employees within the unit, could act as the statutory bargaining representative for that unit. In *Matter of U. S. Bedding Company*, 52 N. L. R. B. 382, the Board stated:

The circumstance that the membership of the C. I. O. is exclusively colored is equally irrelevant. The record refutes any claim that the C. I. O. discriminates against white employees in membership or otherwise. The constitution of the C. I. O. International prohibits racial discrimination, and the record does not show that any white employee has been refused membership. There is no warrant, therefore, for assuming that the C. I. O. discriminates against white persons, and consequently no occasion for passing upon the question whether a union which denies membership to employees on the basis of race may nevertheless represent a unit composed in part of members of the excluded race. We find that the industrial unit is appropriate.

In *Matter of Bethlehem-Alameda Shipyard, Inc.*, 53 N. L. R. B. 999, 1016, the Board said

We entertain grave doubt whether a union which discriminatorily denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race.

The rationale of collective bargaining compels the conclusion that a union which denies membership to Negro employees in the craft cannot act as the representative of a unit composed in part of the excluded employees. Where the justification for denying individuals and minority groups the right to contract on their own behalf fails, the rule that the union chosen by the majority binds the minority is clearly

inapplicable. This is true in every instance where members of the craft are excluded from membership in the organization which conducts the bargaining.

Experts in the field of labor relations recognize that "the only way the minority workers can express their views and exert their influence is through union membership."³² It seems clear that the denial of the opportunity to a particular group within the craft or class to participate in the decisions and functioning of the majority representative creates irresponsibility destructive of the industrial peace which the Act was framed to safeguard. The establishment of working conditions and the administration of collective agreements was left in the Act "to those voluntary processes whose use Congress had long encouraged to protect those arteries of interstate commerce from industrial strife": *General Committee of Adjustment v. Missouri-Kansas-Texas Railroad*, 320 U. S. 323, 337.³³ It was thus the judgment of Congress that uncomelled adjustment of differences between representatives of the railroads and the employees would promote mature and stable relations be-

³² Golden, Clinton S. and Ruttenberg, Harold J., *The Dynamics of Industrial Democracy*, Harpers (1942), pp. 211, 214: "It is * * * a fact of industrial democracy, written into the law, that it is a one-party system of democracy... In this respect it differs from our traditional two-party system of political democracy. * * * To have a voice in making the decisions of the majority the minority or non-union workers have to join the union." * * * industrial democracy functions through a one-party system. All workers are represented by one union and they are not citizens of industry until they belong to it."

³³ See also Chief Justice HUGHES' comment on the 1926 Railway Labor Act in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 569: "All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the Act, must depend for success on the uncoerced action of each party through its own representative, to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained."

tween them. Voluntary participation in the adjustment of disputes was viewed by Congress as indispensable to a responsible adherence by labor organizations to the commitments made in the mediation and arbitration process. But the voluntarism which is crucial in the statutory scheme would be set at naught if groups within the unit were compelled to accept the decisions of the majority without the opportunity for participation in their formulation. Such compulsion creates an atmosphere favorable to industrial strife.

It is impossible for the Brotherhood to represent the Negro firemen fairly and impartially so long as they are barred from membership. Its action cannot be representative until the Negro fireman can go to meetings, know what problems the white firemen are discussing, yet the white firemen hear his views and his problems, participate in framing the bargaining policy and proposals and in the nomination and election of union officers, bargaining and grievance committees.

In the instant case the Brotherhood has been trying to drive the Negro firemen off of the railroads. But even in instances where a union has no intention to seek a collective bargaining agreement which discriminates against a racial minority, the effect of excluding employees of a minority race from membership in the union will invariably result in the terms of the agreement being more favorable to the majority than to the minority. There are innumerable provisions in any collective bargaining agreement which affect employees in different ways. For instance, the kind of a seniority system, whether it is departmental or plant wide, affects one group differently from another. When all the employees to be affected can be heard in open meeting as to the advantages of one system over another and vote on the system for which the union will press in its bargaining negotiations, the will of the majority should govern. But

where a racial group is excluded from membership, although they together with a minority of the group in the union might favor a different seniority system from that favored by a majority of the union, the system favored by the majority of the union will prevail, although the majority of the union may actually be a minority of the craft or class.

From the Declaration of Independence to date, the principle that the only legitimate government is one in which the governed participate, has been one of the most basic tenets of our political philosophy. The framers of the Declaration of Independence denounced as impossible the notion that they could be represented in Parliament by someone whom they did not elect. In the sphere of the government of conditions of employment no less than in any other area of government, it is impossible for a group of employees of one race to in fact be represented by an organization composed solely of employees of another race. And the sponsors of the Railway Labor Act recognized that "the labor union is really a form of government".³⁴

³⁴ Statement of Coordinator of Transportation Eastman, Hearings before the Senate Committee on Interstate Commerce, 73rd Cong., 2nd Sess., on S. 3266, p. 146. See also his statement before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2nd Sess., on H. R. 7650, pp. 33-34.

B

The Railway Act violates the Fifth Amendment if it empowers a union composed solely of members of one race to act as statutory bargaining representative for the craft including members of another race whom it excludes from membership

The power to fix wages, hours of work and other conditions of employment binding on employees who neither consent to the terms established nor participate in their determination is governmental in character. As we have shown (pp. 29-21, *supra*) sponsors of the Railway Labor Act in Congress spoke of the governmental character of the trade unions' functions. Trade unions for years have taken the same position.³⁷ This Court has held that the delegation to a majority of coal miners and the producers of a majority of the tonnage of coal, in specified areas, of the power to fix maximum hours and minimum wages binding on all miners and all producers in the area, was a delegation of a "governmental function." *Carter v. Carter Coal Co.*, 298 U. S. 238, 311.

³⁷ Perlman, Selig, and Taft, Philip, *History of Labor in the United States*, 1896-1932, MacMillan (1935), p. 10. "The trade agreement * * * is a written constitution of a new type of government, an industrial government, established by bargaining as an organized group. * * * the industrial government envisaged by unionism was a highly integrated government of unionized workers and of associated employer managers, jointly conducting the government with laws mandatory upon the individual employer and employee." *Cr. National Labor Relations Board v. Highland Park Mfg. Co.*, 110 F. (2d) 632, 638 (C. C. A. 4).

The powers which the Railway Labor Act confers on the representative selected by a majority of the craft or class, have several additional aspects which render them governmental in character, over and above the fact of fixing terms of employment binding on all employees in the craft or class. The representative is granted power to bind all the employees not only in negotiation of the terms of employment but in their interpretation and application as well. It is clothed not only with "legislative" powers to fix rules but with the "judicial" power to determine as a member of a governmental agency, the National Railroad Adjustment Board, how the rules which it establishes shall be interpreted and applied. It is also clothed with the power to supersede the National Railroad Adjustment Board completely and to create in such manner as it and the employer shall agree, substitute machinery for interpreting and applying the rules it makes.³⁸ And this Court has held that employees are thereby excluded from resort to the courts for a determination of their rights under collective agreements.³⁹

The representative thus is constituted not only the legislative branch of the government controlling his industrial

³⁸ Section 3, First, of the Railway Labor Act provides for the creation of a National Railroad Adjustment Board, in which half of the members shall be selected by labor organizations. Section 3, Second, provides "nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section." It has been held that every employee in the craft or class is bound by the system established in such a collective agreement, and cannot prosecute his grievance in any manner other than that specified. *Atlantic Coast Line R. Co. v. Pope*, 119 F. (2d) 39 (C. C. A. 4).

³⁹ *General Committee v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *General Committee v. Southern Pacific Co.*, 320 U. S. 338.

life, but the judicial and probably the executive, as well. And this whole little sub-government is removed from the controls of political government through this Court's holding that its acts are not subject to review in the judicial system of the nation.

The Railway Labor Act is an instance of the growing tendency within our political institutions of conferring self-regulatory power upon the groups to be regulated.⁴⁰ Congress adopted this method not only because of the practical difficulties in vesting in government officials the task of regulating such complicated and diverse problems,⁴¹ but also because it believed that employees and employers would be more likely to abide by the rules and regulations if the parties themselves established those rules and regulations. If the group to which such self-regulatory powers are delegated, is composed of all the persons to be regulated and organized in such a manner as to afford all its members a democratic participation in their self government, the group would seem to be a proper one to which to make the delegation. It would still have to exercise its powers subject to the restraints that bind Congress (see pp. 33-35, *infra*). But as a depository of such delegated power, a group so organized, with its regulatory powers limited to those who had the opportunity to join the group so long as they obeyed its reasonable rules, would appear to be proper. We be-

⁴⁰ Notes: Delegation of Power to Private Parties, 37 Col. L. Rev. 447 (March 1937); Delegation of Governmental Power to Private Groups, 32 Col. L. Rev. 80 (January, 1932).

⁴¹ See the testimony of Dr. Francis Haas during hearings on the Wagner Bill where he said: "The outstanding defect of government as an instrument of social justice is that it cannot get enough money appropriated to police and enforce labor standards. Other defects are present, but this it seems is the principal one. The alternative is genuine collective bargaining." Hearings before the Senate Committee on Education and Labor, on S. 2926, 73rd Cong., 2nd Sess., p. 116.

lieve Congress intended that only such a group should act as statutory representative under the Railway Labor Act.

The Brotherhood is not such a group. It is an organization composed of only a portion of the employees in the craft or class. It refuses by reason of their race to admit petitioners and other Negro firemen. Nevertheless it claims and has attempted to exercise the power to govern employment terms for the Negro firemen. If the Act be construed to permit the Brotherhood to qualify as a statutory representative, it allows a white majority vast powers over a Negro minority which has no representation in fact. So construed it is unconstitutional. In *Carter v. Carter Coal Co.*, 298 U. S. 238, 310-311, the Court in holding the delegation of power to the majority there involved, violative of the Fifth Amendment said:

8

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some localities, they also compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such

power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp. v. United States*, 295 U. S. at 537; *Eubank v. Richmond*, 226 U. S. 137, 143; *Seattle Trust Co. v. Roberge*, 278 U. S. 116, 121-122.

A construction of the Railway Labor Act which would permit the Brotherhood to act as the representative of the craft or class has a vice not present in the *Carter* case, in that it would violate our constitutional policy against discrimination on account of race. *Smith v. Allwright*, 321 U. S. 649, 664-665. Cf. *Mitchell v. United States*, 313 U. S. 80, 94; *Gibson v. Mississippi*, 161 U. S. 565, 591. So long as petitioners because of race are barred from membership in the Brotherhood and participation in its affairs equally with other members of the craft or class, they are deprived by reason of race of the right to share in the government of the craft or class. Just as admission to membership in the Democratic Party in Texas is a condition to participation in political government, admission to the Brotherhood is a condition to participation in industrial government of the craft or class of firemen.

II

A collective bargaining agreement which by its terms requires a carrier to discriminate against employees within the craft or class because of race in apportioning work is illegal under the Railway Labor Act

If, as we have argued above, the Brotherhood is not qualified to act as the statutory representative of the craft

or class of firemen, its collective bargaining agreement is invalid. Under the Railway Labor Act a carrier can bargain collectively with a union for the craft or class only if the union is entitled to act as the statutory representative of the craft or class. The Railway Labor Act imposes on the carrier "the affirmative duty to treat only with the true representative" and "the negative duty to treat with no other." *Virginian Ry. v. System Federation*, 300 U. S. 515, 548.

Respondent railroads have violated the Railway Labor Act, not only by recognizing the Brotherhood when that organization was not the lawful representative of the railroads' employees, but also by entering into agreements with the Brotherhood which are, in effect, closed-shop contracts. Section 2, Fifth, of the Railway Labor Act forbids the execution of closed-shop contracts on the railroads. Yet the employment preference granted in the collective agreements here involved, although phrased in terms of race, in fact operates to favor Brotherhood members over non-members; no Negro firemen and all white firemen are members of the Brotherhood (No. 37, R. 6; No. 45, R. 83, 86). Thus by gradually forcing the Negroes off the roads, the agreements will achieve the same end as the statute forbids, a monopoly of jobs in the hands of the Brotherhood members.

Moreover, aside from the ultimate effect of the contracts, they have an immediate effect which the statute outlaws. Section 2, Fifth bans not only absolute closed-shop contracts but also bans contracts which achieve any preferential treatment of Brotherhood members. It was expressly noted, when the 1934 Amendments to the Railway Labor Act, containing the present ban on closed-shop contracts, was pending in Congress, that those provisions would make illegal certain then existing contracts between one of the national

railroad unions and some of the carriers which required that at least a specified percentage of the employees in certain classes be members of the union.⁴²

If the Court should determine that the Railway Labor Act permits a representative and a carrier to make and put into effect a collective agreement which drives from their jobs a racial minority, it is to that extent violative of the Fifth Amendment. Racial discrimination is by its very nature forbidden to those who exercise government powers, which in a democracy are subject to the "mandates of equality and liberty that bind officials everywhere." *Nixon v. Condon*, 286 U. S. 73, 88-89.

These constitutional guarantees may not be nullified "through casting * * * (a regulatory) process in a form which permits organizations to practice racial discrimination * * *". *Smith v. Allwright*, 321 U. S. 649, 664. Here the Brotherhood is exercising, and insisting upon exercising, the right granted by the Railway Act to act as the exclusive representative of the entire craft of firemen. "Misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of State law, is action taken 'under color of' State law." *United States v. Classic*, 313 U. S. 299, 326. It is unnecessary to decide to what extent this transforms the Brotherhood into a governmental agency. "The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of

⁴² H. Rep. No. 1944, 73rd Cong., 2nd Sess., pp. 14-16; S. Rep. No. 1065, 73rd Cong., 2nd Sess., Part 2, p. 2; Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73rd Cong., 2nd Sess., pp. 156-157; Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2nd Sess., pp. 28-30, 94-105.

official power The test is not whether the members of the Executive Committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their actions." *Nixon v. Condon*, 286 U. S. 73, 88-89.

Unless this argument is valid, the Federal Government may confer powers on unions which they may exercise in a manner forbidden to the Government itself; powers to suppress a racial minority and deny it "the right to work for a living in the common occupations of the community."⁴³ If the Railway Labor Act provides such a ready means of evading our constitutional guarantees, it is invalid. It does not so provide, however. It does not permit bargaining representatives "to fix hours and wages without standards or limitations," and "according to their own views of expediency" (*Carter v. Carter Coal Co.*, 298 U. S. 238, 318). Rather it requires that they adhere to "the philosophy of bargaining as worked out in the labor movement in the United States" (*Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 346) by entering into agreements "which reflect the strength and bargaining power and serve the welfare of the group" (*J. I. Case Co. v. National Labor Relations Board*, 321 U. S. 332, 338).

So construed, the Act confers no powers the exercise of which cannot be kept within reasonable bounds. If it is construed otherwise, it cannot be sustained.

⁴³ *Truex v. Raich*, 239 U. S. 33, 41. As pointed out in that case (239 U. S. at p. 43), it is manifestly no defense that the exclusion from opportunity to work is not complete or that the discrimination takes the form of a quota system.

For, the very idea that one man may be compelled to hold his life; or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.⁴⁴

The Court should reach the same result were it to view the collective labor agreements as mere contracts between private parties instead of as an exercise of delegated legislative powers to govern conditions of employment. As one Federal court, very aptly, said:⁴⁵

It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. * * * Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other. This would seem to be very clear. * * * Such a contract is absolutely void and should not be enforced in any court * * *

Since no court could constitutionally give any legal effect to the discriminatory provisions of the collective agreements here involved, the Court should declare their invalidity and enjoin the parties thereto from giving them further application.

⁴⁴ *Vick W. v. Hopkins*, 118 U. S. 356, 370.

⁴⁵ *Gandolfo v. Hartman*, 49 Fed. 181, 182-183.

Conclusion

Legislative ingenuity, inspired by the exigencies of our increasingly complex society, continues to devise new instrumentalities for the exercise of governmental functions. Judicial regulation must keep pace with such legislative innovations. Otherwise, tyranny can and will reassert itself in new guise. Such a new mode of oppression is here exposed to judicial scrutiny. Its incompatibility with our fundamental law is revealed. It is submitted that the judgments herein appealed from should be reversed.

Respectfully submitted,

THURGOOD MARSHALL,

WILLIAM H. HASTIE,

*Counsel for National Association for
the Advancement of Colored People.*

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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 37

TOM TUNSTALL,
Petitioner,

v.
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, OGEAN LODGE NO. 76, PORT NORFOLK
LODGE NO. 775, W. M. MUNDEN and NORFOLK SOUTHERN
RAILWAY COMPANY.

On Certiorari to the United States Circuit Court of Appeals
for the Fourth Circuit.

No. 45

BESTER WILLIAM STEELE,
Petitioner,

v.
LOUISVILLE & NASHVILLE RAILROAD CO., corporation;
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, W. H. THOMAS, J. P. ADAMS and B. F.
McGILL.

On Certiorari to the Supreme Court of Alabama.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE AND BRIEF IN SUPPORT THEREOF

AMERICAN CIVIL LIBERTIES UNION.
Amicus Curiae

EDGAR WATKINS,
of the Georgia Bar.

JOHN D. MILLER,
of the Louisiana Bar.

JO DRAKE ARRINGTON
of the Mississippi Bar.

SHIRLEY ADELSON,
ARTHUR GARFIELD HAYS,
of the New York Bar.

D. REEDLEY HEDRITT

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McGILL.

On Certiorari to the Supreme Court of Alabama.

Motion for Leave to File Brief as Amicus Curiae

May it Please the Court:

The undersigned, as counsel for the American Civil Liberties Union, respectfully moves this Honorable Court for leave to file the accompanying brief in these cases as

Amicus Curiae. The consent of the attorney for the petitioners to the filing of this brief has been obtained. Attorneys for the respondents have refused to grant their consent.

Special reasons in support of their motion are set out in the accompanying brief.

November 14, 1944.

ARTHUR GARFIELD HAYS,
Counsel for American Civil Liberties Union
Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 37

TOM TUNSTALL,
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MCGILL.

On Certiorari to the Supreme Court of Alabama.

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION,
*AMICUS CURIAE***

These cases question the validity of the restrictions
which have been imposed on Negro locomotive firemen by
agreement between their statutory representative under
the Railway Labor Act and their employers.

Statement of Interest of American Civil Liberties Union

The American Civil Liberties Union is a national organization, devoted to the protection of civil liberties from the standpoint of the general public whose interests it seeks to defend. It does not express the point of view of labor, of employers, or of any particular racial group, but is a participant on these appeals on the principle that a threat to the civil liberties of one group, or even of one person, is a challenge to the freedom of all.

In our opinion, the restrictions imposed on Negro employees by the agreements in issue constitute an unlawful deprivation of fundamental rights guaranteed by the Federal Constitution. Because of the serious implications of these cases for the future of civil liberties in the United States, we have asked leave of this Honorable Court to file a brief *amicus curiae*.

Restrictions on the Employment and Advancement of Negro Locomotive Firemen

For fifty years Negroes were the accepted majority of firemen on Southern railroads. But particularly since the last War a trend has been under way to drive Negroes from this employment. Contributing factors were the introduction of automatic stokers and diesel-powered engines, whereby dirty, heavy work was transformed into a desirable job, and intensified competition for jobs attendant upon the declining importance of the railroad industry.

On March 28, 1940, the Brotherhood of Locomotive Firemen and Enginemen (~~hereinafter~~ called the "Brotherhood"), acting as representative of the entire craft of firemen under the Railway Labor Act on each of 21 rail-

roads, served on the railroads a notice of the following proposals for modification of existing collective bargaining agreements:

"1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.

"2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.

"3. When permanent vacancies occur on established runs or jobs in any service, only promotable firemen or helpers will be assigned to them."

(Record in *Steele* case at p. 59.)

In railroad parlance, white firemen universally are called "promotable men" and Negroes are designated as "non-promotable men." This is so, because under railroad practice engineers are chosen by promotion from the ranks of firemen, and Negroes are never promoted to the rank of engineer.

With these proposals the Brotherhood aimed at driving the Negro firemen completely out of the service of the railroads and creating a closed shop for its own membership. Negroes at no time have been admitted to membership in the Brotherhood, which is nevertheless their bargaining representative under the Act.

Thereafter, the Brotherhood and the railroads entered into an Agreement on February 18, 1941, seriously curtailing Negro firemen's employment and seniority rights in the railroad industry. The Agreement restricted their employment to seniority districts on which they were then working and provided that they should not exceed fifty

per cent of the employees in each class of service on the seniority district; until such percentage should be reached only promotable men were to be hired and all new runs and vacancies filled by promotable men. The Agreement further reserved the right of the Brotherhood to press for more restrictions on Negro firemen's employment on individual carriers.

In or about May, 1941, the railroads and the Brotherhood negotiated a supplementary agreement for the practical administration of the Agreement of February 18, 1941, providing *inter alia* that the Brotherhood firemen should get the odd job in each class of service.

At no time did the Negro firemen receive notice of the proposed, then executed Agreements, nor an opportunity to be heard.

No attempt has been made to justify the foregoing Agreements as germane to the efficiency of railroad operation.

The President's Fair Employment Practice Committee reviewed these facts at a series of hearings, and on November 18, 1943, issued "findings and directives" declaring the February 18, 1941 Agreement and its supplements discriminatory and ordering that they be set aside. Further illumination of the background and content of these Agreements is to be found in Norshrup, *Organized Labor and the Negro* (1944), Chapter III.

The operation of the restrictions is illustrated by the facts out of which arose both cases at bar. In the Steele case, the petitioner had been in a "passenger pool" composed of six firemen, of whom five were Negro. On April 8, 1941 the pool was reduced to four, and although the petitioner and two other Negro firemen were entitled to

remain in the pool by reason of seniority and good service, the Railroad and the Brotherhood, pursuant to the Agreement of February 18, 1941, arbitrarily disqualified all Negro firemen and reformed the pool with four white firemen, all junior to the petitioner. For a while the petitioner was completely out of work. He then took an arduous and less remunerative job on a local freight and finally lost that job, too, to a junior fireman because of the above Agreements, in spite of the fact that no complaint had been made about his work.

Similarly, in the *Tunstall* case, the petitioner had been serving as fireman on an interstate passenger run, considered a desirable post, when, because of the Agreements, he was removed and assigned to a more difficult and arduous job.

State of the Cases

In the *Steele* case, the petitioner filed a suit in the Alabama Circuit Court for: (1) an injunction against the Railroad Company and Brotherhood to restrain them from enforcing a sole bargaining agent agreement negotiated by the Brotherhood; (2) an injunction against the Brotherhood from acting as his alleged bargaining representative so long as it discriminated against Negroes; (3) a declaratory judgment; (4) damages. Demurrers to the amended complaint were sustained by both the lower court and the Alabama Supreme Court. (16 So. 2d 416.)

In the *Tunstall* case, the petitioner filed a complaint in the Federal District Court for the Eastern District of Virginia seeking: (1) \$25,000 damages for the refusal of the Brotherhood to accept him for membership on account of his race or color, which led directly to his removal

from his job with the Railroad Company; (2) a declaratory judgment declaring the rights and privileges of the parties and that the Brotherhood, acting as exclusive bargaining agent under the Railway Labor Act, was obliged to represent all members of the class involved regardless of race or color; (3) an injunction against enforcement of the agreement between the Brotherhood and the Railroad; (4) an injunction against the Brotherhood from acting as an alleged representative so long as it discriminated against Negroes in membership; (5) restitution to his position. Respondents' motions to dismiss were granted and the United States Circuit Court of Appeals for the Fourth Circuit affirmed. (140 F. 2d 35.)

Importance of the Question

Forthright decision of the questions at issue is of crucial importance. American railroads, in wartime, are suffering a shortage of firemen, at a time when experienced Negro firemen are available. (See monthly reports of Railroad Retirement Board.) Evidence has been presented before the President's Committee on Fair Employment Practice of resulting delays in many instances and of at least one accident. And of the bloody consequences of attempts to drive out Negroes even from their non-promutable classification of locomotive firemen on the Southern railroads, there has been official acknowledgment. See Northrup, op. cit. *supra*, at page 55, citing "Proposed Report of the Federal Coordinator of Transportation on Alleged Discrimination Against Colored Railway Employees of the Illinois Central System", unpublished Ms. in U. S. Archives.

The concerted attempt to drive Negroes out of the jobs of locomotive firemen has already reached the point of interference with interstate commerce. It was that interference that the Railway Labor Act was designed to prevent. Therefore there should be no question of jurisdiction under the Act to decide these momentous issues. As the Supreme Court has many times had occasion to state, the purpose of the Railway Labor Act is to provide means of settlement of disputes that otherwise would interfere with interstate commerce (*Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, at 6):

"The Federal interest that is fostered [by the Railway Labor Act] is to see that disagreement about conditions does not reach the point of interfering with interstate commerce."

Only by a square determination of the problems at issue will this Court be properly effectuating Congressional intent behind the Railway Labor Act.

Moreover, a decision will have telling consequences for the definition of the rights of minority workers everywhere vis-à-vis their statutory representatives. Such representatives are "exclusive" for collective bargaining purposes under the National Labor Relations Act no less than under the Railway Labor Act, and in this role have extensive opportunities for domination, still undefined. Indeed, the possibilities of oppression are particularly great under the National Labor Relations Act which, unlike the Railway Labor Act (Section 2 (5)), countenances closed shop contracts.

From the standpoint of the civil liberties at stake it would seem essential to the preservation of basic prin-

ciples of our democracy to give the Fifth Amendment to the Constitution its proper interpretation; namely, a means whereby the deprivation of the right to work on account of race, which is in issue here, may be declared unlawful. During the coming months this question may be anticipated to become even more acute, as reconversion and the consequent shrinkage of jobs may cause a repetition of such tactics at the expense of Negro workers, who have won a foothold in industry during the war.

POINT I

The restrictions on the employment of Negro locomotive firemen contained in the agreements between the Brotherhood and the railroads are against public policy and are unlawful.

There is not even a pretense of legitimate social objective behind the restrictive Agreements whereby Negroes are to be driven from their employment as locomotive firemen. No plea is made that such Agreements are essential to the efficiency of the railroads. The proposals came from the Brotherhood, and no justification is offered in terms of collective bargaining privileges, or advancement of the working conditions of firemen as a craft or class. The sole motivation lies in the individual interests of the members of the Brotherhood, who would establish a closed shop (Negroes excluded), notwithstanding the prohibition of the Railway Labor Act (Section 2 (5)).

A

By virtue of its position as exclusive bargaining representative under the Act (*Virginian Railway v. Federation*, 300 U.S. 515), the Brotherhood wields considerable power

over who may and who may not be made available for jobs and advancement. American courts (questions of Federal jurisdiction aside) have been quick to realize that the individual must be guarded against the exercise of this kind of a power when not in furtherance of legitimate social objectives. Thus, the coexistence of a closed shop and a restricted membership union has been held unlawful.

"It seems to me necessarily to follow that the union must either surrender its monopoly or else admit to membership all qualified persons who desire to carry on the trade of magazine mailers; otherwise such persons are by the act of the union deprived of the right to earn a livelihood." *Wilson v. Newspaper and Mail Deliverers Union*, 123 N. J. Eq. 347, 197 Atl. 720.

See also *Schub v. Moving Pictures Machine Operators Local*, 109 Pac. (2d) 600 (Oregon).

In *Cameron v. International Alliance*, 118 N. J. Eq. 11, 178 Atl. 692, classification of union members into seniors and juniors was held to be an unreasonable restraint and unlawful, where the juniors were denied the right to participate in the formulation of union policy of the management of union business, and seniors were given power arbitrarily to bar juniors from Union membership. The Court stated that it was clear that the subject in controversy was a property right guaranteed by Federal and State constitutions and that by such regulations, "the constitutional and inalienable right to earn a living" was being bargained away. Constitutional rights of liberty and property may be limited "only to the extent necessary

to subserve the public interest. . . . The design is not to advance the public welfare, but the individual interests of the senior members solely. It is a perversion, an embezzlement of power." The Court concluded:

"It is patent that the senior members are striving to obtain a monopoly of the labor market in this particular trade, and to deprive the junior members of an equal opportunity to obtain employment and earn a livelihood for himself and his family. In fact, monopoly has been practically accomplished; absolute and complete dominion of the labor market is within reach. The public evils flowing from this policy are apparent. It tends to economic servitude—the impoverishment of the one class, the 'juniors' for the enrichment of the other—and is manifestly opposed to the public interest. *The inevitable results are the loss of the services of useful members of society, and unrest, discontent and disaffection among the workers so restrained—a condition that is unquestionably imimical to the public welfare.*" (Emphasis supplied.)

In accord with the principles animating the decision in the *Cameron* case are *Smetherham v. Laundry Workers' Union*, 44 Cal. App. (2d) 131, 111 Pac. (2d) 948, where it was held improper to expel plaintiff from the Union since the Union's interest had not been adversely affected by her fight with a fellow employee which was the occasion for the expulsion; *Reilly v. Hogan*, 32 N. Y. S. (2d) 864, aff'd 264 App. Div. 855, where in ordering reinstatement of a Union member expelled for the alleged circulation of deceitful statements concerning Union leaders during the Union election campaign, the court stated that "as umpire, the Court inquires whether fair play has

been practiced. * * * No individual or group of individuals, organized or unorganized, is above the law"; and *Walsche v. Sherlock*, 110 N. J. Eq. 223, 159 Atl. 661, where the Union officers were successfully restrained from using a card index system under which an employee could not work without an employment card from the Union.

An instructive decision was that of the Kentucky court in *Piercy v. Louisville & N. R. Co.*, 198 Ky. 477, 248 S. W. 1042 (before passage of Railway Labor Act). There, as in the cases at bar, seniority rights under a contract were violated by an order of the company "for no reason involving the efficiency of the operation of the railroad and for the only reason that it had been requested by" the Union. The complainant was a member of the Union. The court held that the Union was his representative only.

"for the limited purpose of securing for him, together with all other members, fair and just wages and good working conditions. * * * If the right of seniority may be changed or waived, or otherwise dispensed with by the act of a bare majority of an organization, * * * it would be builded upon a flimsy foundation of sand which might slip from under him at any time by the arbitrary action of the members, possibly to serve their own selfish ends in displacing him."

B

Where the oppression made possible by monopoly of the job market is drawn along racial lines, the public interest is even clearer. This has been recognized by the decisions of several American courts, granting an injunction against the compulsory relegation of Negroes to separate auxiliary union locals. *Joseph James etc. v. Marinship*

Corporation et al. (Superior Court, Calif., Feb. 17, 1944, on appeal to the California Supreme Court); *Gerald R. Hill et al. v. International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America et al.* (Superior Court, R. I., January, 1943). (Both unreported.)

Irrelevant distinctions on the basis of race or nationality are "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U. S. 81, at 100. Where the right to earn a livelihood is involved, such distinctions are particularly odious to this Court. *Truax v. Raich*, 239 U. S. 33.

In *Truax v. Raich*, a State statute which attempted to place restrictions on the right of aliens to be employed within the State was struck down as repugnant to the Federal constitution. Noting that under the statute "the complainant is to be forced out of his employment as a cook in a restaurant simply because he is an alien," this Court said (239 U. S. at 41):

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the policy of the Amendment to secure. * * * If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."

In the cases at bar the right to work is being denied to Negro locomotive firemen, solely because of their race and without any legitimate reason for the classification, and by virtue of exclusive bargaining rights given to the white Brotherhood as majority representative under the Railway Labor Act.

POINT II

The rights of petitioners are protected by the Fifth Amendment.

There can and should be no question but that the infringement of the right of Negroes to work falls within the condemnation of the Fifth Amendment to the Federal constitution. That the Fifth Amendment prohibits arbitrary distinctions along racial lines was clearly indicated by this Court in the recent case of *Hirabayashi v. United States*, 320 U. S. 81.

The cases here do not involve action by private individuals, with respect to which the restraints of the Fifth Amendment do not apply (*Corrigan v. Buckley*, 271 U. S. 323). The restrictive agreements were made only by virtue of a grant of governmental authority under the Railway Labor Act. Solely by virtue of that statute does the Brotherhood represent the entire class of firemen, and not by mandate of the men themselves.

The agreement between the Brotherhood and the railroads, consummated under the Railway Labor Act, is no more free from constitutional restraint on the denial of property without due process of law than were the restrictions at issue in the leading case of *Nixon v. Condon*, 276 U. S. 78. In *Nixon v. Condon* it was under a State statute, whereby every political party through its executive committee was to have power to prescribe the qualifications of its own members, and not under any authorization from the ranks of the party; that the executive committee of the Democratic party in Texas adopted a resolution that only white Democrats should participate in the primary elections, thereby excluding Negroes. The com-

mittee's action was held to be State action within the meaning of the Fourteenth Amendment to the Constitution. Similarly, it is only because of authority derived from the Railway Labor Act and not because of any authorization from the employees themselves, including the petitioners involved in these cases, that the Brotherhood and the railroads adopted certain agreements whereby Negroes would be restricted and gradually driven from the jobs of locomotive firemen. The Court stated in *Nixon v. Condon* as follows:

"The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. * * * The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action."

Thus there can properly be no question of the cognizance under the Fifth Amendment to the Constitution of the important questions of civil liberties raised on this appeal.

Because of the presence of serious constitutional issues, as well as because of a significant variance on the facts and the law, these cases are sharply distinguishable from earlier decisions of this Court, in which there was a finding of no Federal jurisdiction under the Railway Labor Act. *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (reviewability of certification order); *General Committee, etc. v. M. K. T. R. R. Co.*, 320 U. S. 323; *General Committee v. Southern Pacific Co.*, 320 U. S.

338 (all involving jurisdictional disputes between rival railway unions referable to the National Mediation Board). In the *Switchmen's* case the Court even expressly stated (320 U. S. at 301):

"All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." (Emphasis supplied.)

Indeed, as under well-established canons of construction statutes should, where possible, be construed as constitutional, the Congressional intent behind the Railway Labor Act should not properly be interpreted to grant exclusive bargaining rights without the implicit condition that the grant will not be used to oppress a minority.

CONCLUSION

The Agreement of February 18, 1941 and its supplementary agreements should be declared invalid; an injunction should be ordered to restrain any further acts pursuant thereto; petitioners should be restored to their rights; the obligation of the statutory representative under the Railway Labor Act to represent minority employees fairly should be declared; and other and further relief prayed for by the petitioners should be granted.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,

Amicus Curiae.

EDGAR WATKINS,
of the Georgia Bar,

JOHN D. MILLER,
of the Louisiana Bar,

JO DRAKE ARRINGTON,
of the Mississippi Bar,

SHIRLEY ADELSON,

ARTHUR GARFIELD HAYS,
of the New York Bar,

R. BEVERLEY HERBERT,
of the South Carolina Bar,

T. POPE SHEPHERD,
JORDAN STOKES III,
of the Tennessee Bar,

HOWARD B. LEE,
of the West Virginia Bar,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 37.—OCTOBER TERM, 1944.

Tom Tunstall, Petitioner,
vs.
Brotherhood of Locomotive Firemen
and Enginemen, Ocean Lodge No. 76,
Port Norfolk Lodge No. 775, et al. } On Writ of Certiorari to
the United States Circuit Court of Appeals
for the Fourth Circuit.

[December 18, 1944.]

Mr. Chief Justice STONE delivered the opinion of the Court.

This is a companion case to No. 45, *Steele v. Louisville & Nashville Railroad Co., Brotherhood of Locomotive Firemen and Enginemen and others*, decided this day, in which we answered in the affirmative a question also presented in this case. The question is whether the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. §§ 131, *et seq.*, imposes on a labor organization, acting as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race. The further question in this case is whether the federal courts have jurisdiction to entertain a non-diversity suit in which petitioner, a railway employee subject to the Act, seeks remedies by injunction and award of damages for the failure of the union bargaining representative of his craft to perform the duty imposed on it by the Act, to represent petitioner and other members of his craft without discrimination because of race.

Petitioner, a negro fireman, employed by the Norfolk & Southern Railway, brought this suit in the District Court against the Railway, the Brotherhood of Locomotive Firemen and Enginemen and certain of its subsidiary lodges, and one of its officers, setting up, in all material respects, a cause of action like that alleged in the *Steele* case. The Brotherhood, a labor union, is the designated bargaining representative under the Railway Labor Act, for the craft of firemen of which petitioner is a member, and is accepted as such by the Railway and its employees.

Acting as such the Brotherhood gave to the Railroad the notice of March 28, 1940, and later entered into the contract of February

2 *Tunstall vs. Brotherhood of Locomotive Firemen etc., et al.*

18, 1941 and its subsequent modifications, all of which were the subject of our consideration in the *Steele* case. Petitioner complains of the discriminatory application of the contract provisions to him and other Negro members of his craft in favor of "promotable", i.e. white, firemen, by which he has been deprived of his pre-existing seniority rights; removed from the interstate passenger run to which he was assigned and then assigned to more arduous and difficult work with longer hours in yard service, his place in the passenger service being filled by a white fireman.

He alleges that the contract was signed and put into effect without notice to him or other Negro members of his craft, and without opportunity for them to be heard with respect to its terms, and that his protests and demands for relief to the Railway and the Brotherhood have been unavailing. Petitioner prays for a declaratory adjudication of his rights, for an injunction restraining the discriminatory practices complained of, for an award of damages and for other relief.

The District Court dismissed the suit for want of jurisdiction. The Circuit Court of Appeals for the Fourth Circuit affirmed, 140 F. 2d 35, on the ground that the federal courts are without jurisdiction of the cause, there being no diversity of citizenship and, insofar as the suit is grounded on the wrongful acts of respondents, it is not one arising under the laws of the United States, even though the union was chosen as bargaining representative pursuant to the Railway Labor Act. See *Gully v. First National Bank*, 299 U. S. 109, 112, 114.

For the reasons stated in our opinion in the *Steele* case the Railway Labor Act itself does not exclude the petitioner's cause of action from the consideration of the federal courts. Cf. *Switchmen's Union v. National Mediation Board*, 320 U. S. 297; *General Committee v. M.-K.-T. R. Co.*, 320 U. S. 323; *General Committee v. Southern Pacific Co.*, 320 U. S. 338; *Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees*, 320 U. S. 715, 816; with *Texas & New Orleans Railroad Co. v. Brotherhood of Railway Clerks*, 281 U. S. 518; *Virginian Railway Co. v. System Federation*, 300 U. S. 515.

We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is

the federal statute which condemns as unlawful the Brotherhood's conduct. The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted. *Deitrick v. Greaney*, 309 U. S. 190, 200-201; *Board of County Commissioners v. United States*, 308 U. S. 343; *Soda Electric Co. v. Jefferson Co.*, 317 U. S. 173, 176-7; cf. *Clearfield Trust Co. v. United States*, 318 U. S. 363. The case is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction by 28 U. S. C. § 41(8), Judicial Code § 24(8); *Milford v. Smith*, 307 U. S. 38, 46; *Peyton v. Railway Express Agency*, 316 U. S. 350; cf. *Illinois Steel Co. v. B. & O. R. Co.*, 320 U. S. 508, 510-511.

For the reasons also stated in our opinion in the *Steele* case the petitioner is without available administrative remedies, resort to which, when available, is prerequisite to equitable relief in the federal courts. *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117, 123; *Porter v. Investors Syndicate*, 286 U. S. 461, 471; 287 U. S. 346; *Natural Gas Co. v. Slattery*, 302 U. S. 300, 309; *Atlas Ins. Co. v. Southern Inc.*, 306 U. S. 563.

We hold, as in the *Steele* case, that the bill of complaint states a cause of action entitling plaintiff to relief. As other jurisdictional questions were raised in the court below which have not been considered by the Court of Appeals, the case will be remanded to that court for further proceedings.

Reversed.

Mr. Justice MURPHY concurs in the result for the reasons expressed in his concurring opinion in *Steele v. Louisville & Nashville R. R. Co.*